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**U.S. CONFLICTS THEORY:
IMPACT ABROAD**

Vitta *Juenger*
Lando *Lowenfeld*
Siehr *Reese*

Hanotiau

FOREIGN LAW IN ENGLISH *Szladits*

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THE INFLUENCE OF MODERN AMERICAN CONFLICTS THEORIES ON EUROPEAN LAW

On June 1 and 2, 1981 an international colloquium on the above-mentioned topic took place in Bologna, Italy. At the invitation of the law faculty of the University of Bologna, Professors P. Mengozzi (Bologna) and E. Vitta (Florence), twenty-one specialists gathered, eight from Italy, ten from other European countries and three Americans. After Opening Remarks by Mengozzi evoking the spirit of the origins of private international law linked to his celebrated university, four Europeans addressed the symposium topic: Vitta in general terms, Lando (Copenhagen) with special reference to contracts, Siehr (Hamburg) to family law and Hanotiau (Louvain) to torts. They were followed by American Reports by Juenger, Lowenfeld and Reese. In the subsequent discussion, Mosconi (Pavia), von Overbeck (Fribourg), Pocar (Milan), Sauveplanne (Utrecht), Evrigenis (Thessaloniki), Hartley (London), North (London), Picone (Bari) and van Hecke (Brussels) made extended contributions. We take pleasure in publishing the principal papers.

EDOARDO VITTA

The Impact in Europe of the American "Conflicts Revolution"

What has been described as the American "conflict revolution" consists of doctrinal writings and case law which have dominated American practice since the fifties. This development started in the thirties when a number of distinguished law teachers began to criticize the traditional way of solving conflict of laws problems. The extent of the rejection of the "old" methods by the various American conflict theories is not the same and the proposals for resolving conflict problems differ. But all of the modern theories have in common a critical attitude towards mechanical choice of law rules and the desire to make conflict law more responsive to the demands of substantive policies.

The main objection to the traditional choice of law rules centers around a specific accusation, repeated over and again in different terms. Such rules—it is said—are rigid in their structure and produce capricious results. Classifying *in abstracto* broad categories of cases and deciding beforehand by which law each of them should be governed has been described by Prof. David Cavers as a "blindfold test."[1] Others decry the mechanical and *a priori* character of such rules and would replace them with a more elastic approach, permitting individual *ad hoc* solutions.

As to the proposed new solutions, a comprehensive statement of the various theories is out of the question here. But some generalizations are possible. We find that American authors have in turn suggested that judges confronted with specific conflict cases should apply: a) the law having the greatest number of or the most important connections with the case: this is the "most significant relationship" theory (also called "center of gravity," or "grouping of contacts" theory) one of the principal features of the *Restatement, Second, Conflict of Laws* (1971);[2] b) the law of the forum, if the forum has an interest in the application of its law: this is the "govern-

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1. See Cavers, "A Critique of the Choice of Law Problem," 47 *Harv. L. Rev.* 173-208 (1933-1934).

2. See Reese, "Conflict of Laws and the Restatement Second," 27 *Law & Contemp. Prob.* 679-699 (1963); id., "Discussion of Major Areas of Choice of Law," 111 *Recueil des Cours* 315-416 (1964).

mental interest" analysis proposed by Prof. Brainerd Currie;[3] c) the *lex fori*, considered the basic law, to be displaced only exceptionally by a foreign law: this is the gist of Prof. Albert Ehrenzweig's theory, at least in an early phase of his thought;[4] d) the so-called "better law" (or "better rule") approach, namely that law, of the laws connected to the case, giving the most satisfactory practical result in the settlement of the case: this was originally proposed by Prof. David Cavers.[5]

These generalizations are, of course, over-simplified. Also the various theories, as originally proposed, have, in the course of time, been revised by scholars and judges (see infra, text following n. 57). Still, such generalizations may help to emphasize the contrast to the traditional conflict of laws method, which attempts to provide solutions for future cases (as rules of law generally do). It is designed to consider in advance the question of the most appropriate connecting factors for various types of cases. In so doing, the traditional approach also evaluates policies underlying the choice of law. The traditional method, moreover, considers the *lex fori* as but one of the laws possibly to be chosen, rather than as the basic law. Though sometimes it will take into consideration the content of competing substantive rules, it does so only in a few well defined cases and to a limited extent.

The new tendencies emerging in the U.S. have puzzled and amazed European scholars. It took some time for us to become fully aware of what was going on on the other side of the Atlantic. At first Europeans were moved primarily by intellectual curiosity about such novelties. Later however, some Europeans attempted to analyze the American developments and perspectives. Their efforts took the form of comprehensive studies,[6] of comments on single

3. See Currie, *Selected Essays on the Conflict of Laws* (1963).

4. See Ehrenzweig, "The *Lex Fori*—Basic Rule in the Conflict of Laws," 58 *Mich. L. Rev.* 637-688 (1960); id., *A Treatise on the Conflict of Laws* 314-315 (1962).

5. See Cavers, supra n. 1 esp. at 192 ff.

6. See the following Hague lectures: Kegel, "The Crisis of Conflict of Laws," 112 *Rec. Cours* 95-263 (1964); Evrigenis, "Tendances doctrinales actuelles en droit international privé," 118 *Rec. Cours* 317-433 (1966); De Nova, "Historical and Comparative Introduction to Conflict of Laws," 118 *Rec. Cours* 443-622 at 591-610 (1966); Ferrer Correia, "Les problèmes de codification en droit international privé," 145 *Rec. Cours* 57-203 at 72-96 (1972); Lalive, "Tendances et méthodes en droit international privé (cours général)," 155 *Rec. Cours* 1 at 192-207 (1977); Vitta, "Cours général de droit international privé," 162 *Rec. Cours* 9 at 163-189 (1979). See also De Nova, *Le concezioni statunitensi dei conflitti di leggi viste da un continentale* (1964); Heini, "Neuere Strömungen im Amerikanischen Internationalen Privatrecht," 19 *Ann. suisse droit int.* 31-70 (1962); Vitta, "Réflexions sur quelques théories récentes aux États-Unis d'Amérique en matière de conflits de lois," 47 *Rev. dr. int. et dr. comp.* 201-212 (1970); Hanotiau, *Le droit international privé Américain* (1979); Kegel, "Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers," 27 *Am. J. Comp. L.* 615-33 (1979).

doctrines[7] or of references to certain aspects of these doctrines for the sake of comparing them to European developments.[8]

European Criticisms

The focal point of the attack on the American theories varies from author to author, but mostly relies on the following interrelated considerations.

Europeans tend to criticize all the new theories for granting judges a measure of freedom that goes beyond the limits of appropriate judicial discretion. Accordingly prospective litigants are left in doubt as to how their case is going to be decided, which impairs the fundamental principle of certainty of the law.[9]

The principle of legal certainty is of greater importance in Europe than in the U.S., where courts feel more inclined to attribute primary importance to the satisfactory solution of individual cases. This characteristic of the American legal system does not imply, however, a denial of the idea that law consists of rules that claim application in future cases. Such rules may be statutory or judge-made. But, even then, the creation of new rules takes place through a process of successive interpretations. Thus modern American conflict theories, advocating completely new approaches and sudden changes, deviate from the traditional manner of creating new law. It therefore appears that behind the widespread criticism of the new theories' break with the principle of legal certainty, there looms an even larger issue. That is to say, the new approaches may have abandoned generally accepted notions about the nature of legal rules and judicial law-making.

None of the American theories can escape this criticism. The "most significant relationship" theory requires a subjective appreciation of the links that make it important to submit a conflict case to one law rather than another. The "governmental interest" theory and the analysis it requires are likewise marked by a high degree of

7. See Heini, "Eine Neue Methode im Internationalen Privatrecht? Zum Buch von David F. Cavers: The Choice of Law Process," 1 *Zeit. Schweiz. Recht* 265-281 (1967); Siehr, "Ehrenzweig's *lex fori*-Theorie und ihre Bedeutung für das amerikanische und deutsche Kollisionsrecht," 37 *RabelsZ* 466-484 (1970); Joerges, *Zum Funktionswandel des Kollisionsrecht (Die "Governmental Interest Analysis" und die "Krise" des internationalen Privatrecht)* (1971); Juste Ruiz, "Interest-Oriented Analysis Approach to International Conflict of Laws: the American Experience," 23 *Neth. Int. L. Rev.* 5-52 (1976).

8. See van Hecke, "Principes et méthodes de solution des conflits de lois," 126 *Rec. Cours* 399-571 at 458 ff. and 476 ff. (1969); Loussouarn, "Cours général de droit international privé," 139 *Rec. Cours* 271-385 at 342 ff. and 363 ff. (1973).

9. This criticism is widespread; see e.g., Loussuarn, supra n. 8 at 368; Lalive, supra n. 6 at 366 ff. Lalive quotes a message sent in 1887 by the Swiss government to the legislative body saying that case by case justice not answering to fixed principles brings about "total uncertainty" and, in turn, arbitrariness.

subjectivity. Subjectivity is even more rampant in the "better law" theory, which leaves it to the judge to decide which substantive rule best resolves the case.

A second criticism frequently heard is related to the first: the new theories in practice largely rely on the *lex fori* to resolve conflict cases.[10] The so-called "homeward trend" accords with the practice of judges in various countries to prefer whenever possible application of their own rather than foreign law. That trend is favored by the new theories. As a matter of fact, when a judge is invited to evaluate the most significant relationship a case has with a given law, he is at liberty to conclude that the closest link is with the *lex fori*. He will probably reach the same conclusion if asked to decide whether the forum is the most interested state or which law should be considered the most satisfactory.

Beyond that it must be noticed that the new theories sometimes expressly tell judges to apply, in particular instances, the *lex fori*. Thus the governmental interest analysis in Currie's original version envisages that when the forum has a legitimate interest in the application of its own law, the judge should apply it without taking into consideration the possible interests of other states. Similarly, the application of the *lex fori* is suggested when neither the forum nor a foreign state have an interest and, finally, when two or more foreign states have an interest in the application of their laws and the forum state is disinterested.[11] Ehrenzweig's original plea to consider the *lex fori* as the basic law goes even further. He elevates the application of the *lex fori* to a general principle of Private International Law, to be displaced only exceptionally by the application of foreign law.[12]

The practice of American courts shows that judges are likely to exploit the opportunity afforded by the new theories. In the well-known *Babcock* case (1963) the New York Court of Appeals applied its own law rather than the traditional *lex loci commissi delicti* (the law of Ontario, where the accident happened). Numerous other courts have followed suit. Most of the decisions involve choice of law in the field of torts,[13] but there are also contract (especially insurance contract) cases and some that deal with other branches of

10. This criticism as well is widespread. See Juenger, "La doctrina estadounidense contemporánea a través de algunos autores," *Primer seminario nacional de derecho internacional privado* 249-275 at 272 ff. (Mexico City, 1979).

11. See Currie, supra n. 3 at 155-156, 167-168.

12. See Ehrenzweig, supra n. 4.

13. See e.g., Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727 (1967); Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. den. 414 U.S. 856 (1973).

the law.[14] Recourse to the *lex fori* has mostly been justified by application of governmental interest analysis, which emphasizes the interest of the forum state in the application of its law.[15] But courts have also resorted to other theories, such as the most significant relationship and the better law approaches, to reach the same results.[16] Frequently courts resort in an eclectic fashion to more than one theory to justify these conclusions.[17]

The tendency to apply the *lex fori* amounts to a return to the kind of territorialism that, in the past, characterized certain schools of statutists[18] and which has since experienced a limited measure of revival in some European countries as well.[19] However, the American theories push territorialism very far indeed: it has been observed that the role assigned to local law by government analysis, as proposed by Currie, is unprecedented.[20] Ehrenzweig's conception of the *lex fori* as a basic rule has been said to constitute a denial of the very essence of Private International Law, which finds its *raison d'être* in the necessity to apply, at least in some cases, a foreign law rather than the *lex fori*.[21]

Finally there is a third criticism: the new theories accord overriding importance to the problem of jurisdiction as opposed to choice of law. A trend to that effect may also be discerned in England, where in certain cases (such as divorce, legal separation, guardianship and adoption of children, alimony) the exercise of jurisdiction implies the application of English law. The new American theories go much farther. The tendency invariably to apply local law brings about a high degree of equivalence between judicial ju-

14. See e.g., Intercontinental Planning Ltd. v. Daystrom Inc., 24 N.Y.2d 372, 203 N.E.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 333 (1965).

15. See e.g., Hurtado v. Superior Court of Sacramento County, 522 P.2d 666 (Cal. 1974).

16. See e.g., Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

17. It is interesting to note that in the symposia on *Babcock* (*Colum. L. Rev.* (1963) 1212-1257) and *Reich* (*U.C.L.A. L. Rev.* (1967-1968) 551 ff.) several participants found that these cases had adopted the respective (rather divergent) point of view.

18. Thus, according to French statutist d'Argentré (1519-1590), statutes (laws) are in principle territorial. The Dutch statutists Paul (1619-1677) and John (1647-1714) Voet, as well as Ulrich Huber (1626-1694), considered all laws territorial, so that the application of foreign law depended entirely on Courtesy (*comitas gentium*).

19. Thus some scholars and courts, mostly French, consider the conflict rules optional. Accordingly foreign law can be superseded by the *lex fori* whenever the parties do not invoke it: the so-called *vocation universelle* or *plénitude de compétence* of the French law. See Bischoff, *La compétence du droit français dans le règlement des conflits de lois* (1959). For a criticism, see Lalive, supra n. 6 at 158 ff. See also the *Bisbal* case, decided on 12 May 1959 by the French *Cour de Cassation* (*R. crit.* 1960, 62, note Batiffol), and the *Sznajer* case, decided on 11 May 1966 by the Swiss Federal Tribunal (*Clunet*, 1970, 418 note Lalive).

20. See Kegel, supra n. 6 at 06.

21. Thus Evrigenis, supra n. 6 at 369 ff.; Kegel, supra n. 6 at 226 ff., maintains that Ehrenzweig's theory constitutes an anachronism in an increasingly smaller world.

risdiction and choice of law. Thus the problem of choice of law, though it may exist theoretically, is overshadowed and in practice subsumed under the problem of jurisdiction.[22] Such a broad coincidence between *forum* and *lex* is objectionable.[23] Moreover, if this practice should spread, plaintiffs would seek to sue in courts of the state whose law they consider most favorable to their interests. They could then escape the provisions of the law which appears most appropriate to the solution of the case. That amounts to forum shopping, an altogether unwelcome development.[24]

Peculiarities of the U.S. Conflict System

Some European authors qualify their criticism of the new American theories by saying that it is mainly aimed against any attempt at transplanting them to Europe, admitting that such theories may find at least an explanation in the legal and constitutional framework of the U.S.[25]

These authors tend to point out that the bulk of conflict cases decided by American courts involve multistate rather than international problems.[26] This gives the theory and practice of American conflicts law a character of its own, different from that in European countries, whose judges deal almost exclusively with international cases. The few instances of internal conflicts that occasionally arise in Europe are handled by adapting international conflicts rules.[27] To equate conflicts in Europe to those in the U.S. may therefore be fallacious.

Another difference is that the states of the American federation, except Louisiana, have adopted the common law and have developed it along similar lines. Notwithstanding numerous differences in the statutes and divergent interpretations of the common law in the various states, the degree of similarity is substantial. This makes it fairly easy for the judges of each state to understand the

22. See Lipstein, "The General Principles of Private International Law," 135 *Rec. Cours* 97-230 at 146 ff. (1972); van Hecke, supra n. 8 at 458 ff.

23. On the problem of dissociating *forum* and *lex*, see Vitta, supra n. 6 at 93 ff.

24. See Evrigenis, supra n. 6 at 38; van Hecke, supra n. 8 at 458 ff. and authors there quoted.

25. See Evrigenis, supra n. 6 at 383 ff.

26. For an attempt to differentiate international from internal conflicts, see Ehrenzweig's *Private International Law: A Comparative Treatise on American International Conflict Law*, I: *General Part* (1972); II and III: *Special Part* (1973 and 1977, with Jayme).

27. See, for instance, the Spanish statute of 17 March 1973, enacting a new Preliminary Title of the Civil Code, dealing with both international and internal (art. 13-16) conflicts; the Yugoslav laws of 30 March 1978 and 27 February 1979 dealing, respectively, with obligations and family and succession matters in internal conflicts. These enactments apply to internal conflicts, *mutatis mutandis*, the rules concerning international conflicts.

policies behind a sister state's law. In contrast, European judges are often confronted with rules deriving from legal systems vastly different from their own. In such a situation it becomes much more difficult to ascertain and understand the foreign policies.

A further difference derives from the constitutional framework and federal structure of the U.S. The fact that the full faith and credit clause of the U.S. Constitution requires recognition by each member state of the "Acts, Records and judicial Proceedings of every other state" would seem to foster inter-state cooperation and to limit the freedom of judges to apply forum law. This aspect has been deemphasized by advocates of the modern approaches. Also, the United States Supreme Court, which in the past has somehow curtailed unreasonable assertions of jurisdiction and excessive application of forum law, has lately held that states are almost entirely free to do as they wish in these fields.[28]

The situation is different from that in Europe, where conflict of laws is not influenced by constitutional mandates but by a common historical tradition and by considerations of expediency. The theories developed centuries ago by glossators and statutists dealt with conflicts between the statutes of cities in the Holy Roman Empire, i.e. with choice of law problems internal to a political body. This situation ceased to exist when Europe was fragmented into independent nation states. Thus only what remains of an earlier tradition can assure the degree of similarity which still characterizes the conflicts laws of the various European countries.[29]

American Criticisms of the European Approach

To complete the picture, I shall briefly deal with the reactions of European authors to the American accusation against the "blindfold" and "mechanical" character of the traditional conflict rules. This accusation forms a common starting point of all of the new theories.

It seems unfair to depict the traditional choice-of-law method and the conflict rules derived from it as robot-like machinery operating at random, producing spurious results, without bothering about their soundness and disregarding social realities. Such a picture, it

28. See Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981), where the Supreme Court (4 judges concurring, 3 dissenting) has affirmed that the states of the Union have a very great measure of discretion in deciding whether to apply their own law. The question related to a Wisconsin resident commuting daily to Minnesota to work. It was held that Minnesota was entitled to apply its rules on stacking (a sort of insurance): working in a state, even without residing there, was considered a sufficient contact to apply that state's law.

29. The principle of uniformity of results has thus taken the place of the previously prevailing principle of equality of solutions, see Vitta, supra n. 6 at 41 ff. and authors there quoted.

has been said, is a caricature of the traditional method as seen through the distortions of American spectacles.[30] In effect, beginning with the first decades of the present century, a remarkable joint effort of authors of many countries has contributed not only to elaborate a definition of the objectives, functions and nature of the conflict rules, but also to specify how they should be interpreted and applied to assure their smooth functioning.

To take an example, let us consider the question of flexibility in connection with the technique of determining the applicable law through the use of connecting factors. Traditional conflict rules appear rather rigid since they tend to use a single connecting factor that points to only one law. But the desired degree of flexibility can be assured by adopting a number of connecting factors, operating subsequently or alternatively to each other. In the first instance an alternative connecting factor covers the case that the law first indicated cannot be applied for some reason, as is the case when the first connecting factor points to the national law of a person who is stateless. The second reference of the two-pronged conflict rule would then refer to the law of that person's domicile. A different kind of alternative reference rule enumerates three or more connecting factors and makes the selection of the applicable law depend on which of them favors certain results (e.g., validity of an act), or persons (e.g., the law most favorable to the child).

The first, and even more the second, type of rule clearly assures flexibility, but within sufficiently specific limits so as not to impair the character of the conflict rule as a legal norm. Such rules do not leave it open to the judge to decide what law to select, but prescribe the result he must reach in the circumstances of the case.

Let us now consider the charge that traditional conflict rules disregard the social interests involved. This accusation is levelled mainly by governmental interest analysis, according to which it is the function of judges to analyze legal policies and governmental interests. However it appears that the interests to be considered by states when enacting their conflict rules are *private* interests, namely interests of individuals. So that, when enacting or evolving such rules jurisprudentially, the aim is to serve in the best possible way the interests of the citizens of the state, or of foreigners suing before its courts.[31]

Traditional conflict rules are therefore not indifferent to social values, even if the interests they consider are those of individuals and not of states. Thus, for instance, there is no doubt that sociopolitical considerations play a part, e.g., in the selection by a state of

30. See van Hecke, supra n. 8 at 329.
31. Compare Kegel, supra n. 6 at 209.

either domicile or nationality as a connecting factor in matters of personal status, of *lex situs* or the personal law of the owner for movables, of *lex loci* or *lex voluntatis* for contracts.[32]

A last point to be considered is the indifference of traditional conflict rules to the content of the foreign laws they declare applicable. In contrast, the better law theory advises judges to choose that law which furnishes the most satisfactory practical results. But such a proposal has been criticized on the ground that there is a natural order of the questions of the law applicable and of the content of such a law: the first question logically precedes the second.[33] Others point out that judges declare which is the applicable law only at the end of an analysis in the course of which they obtain all the necessary information as to the content of the competing rules. Accordingly, it is contrary to reality to say that they choose *a priori* a law whose content is unknown to them.[34]

We may add that there are conflicts rules specifically requiring that the content of foreign law be taken into consideration in making choice-of-law decisions. For example, foreign law may not be applied if it is contrary to the forum's public policy: to come to that conclusion the content of the foreign law must be scrutinized. Other examples are alternative reference rules which prefer the law that favors certain results (validity of the act, law more favorable to a certain category of persons, etc.). Such conflicts rules obviously require prior examination and comparison of the content of the laws considered by the alternative connecting factors.

Recent Developments in Europe

After this examination of European reactions to the new American theories, mostly critical, it seems appropriate to show how some of these doctrines have travelled to Europe. Since there are other specific reports at this Round Table on this topic, I shall limit myself to a few general remarks.

First of all, it is apparent that the impact of the American "revolution" (a pacific one!) has been felt only in a few European countries—such as Germany, Switzerland, Austria, the Netherlands and the Scandinavian countries[35]—and only on a limited number of

32. Compare Lalive, supra n. 6 at 339 ff.

33. See Kahn-Freund, "General Problems of Private International Law," 143 *Rec. Cours* 139-474 at 259 (1974), quoting Lewald, 57 *Rec. Cours* 201-324 at 207 (1960), according to whom there is an "irreversible order" of the two questions.

34. See van Hecke, supra n. 8 at 481 ff.

35. Greater attention to the social and political aspects of Private International Law was advocated in Germany by Flessner, "Fakultatives Kollisionsrecht," 34 *RabelsZ* 547-584 (1970); Rehbinder, "Zur Politisierung des internationales Privatrecht," 28 *Juristenzeitung* 151-158 (1973); Zweigert, "Zur Armut des internationalen Privatrechts an sozialen Werten," 37 *RabelsZ* 434-452 (1973): English transl. in 44 *U.*

topics.[36] Still it does seem that the "revolutionary" wave has indeed reached the European shores, though it has lost some of its force while rolling across the Atlantic.

American influences have intermingled with original European theories and practices, whose declared aim is to attain a greater measure of justice and greater flexibility in the working of conflict rules. It is useful to dwell briefly on such theories and practices, since their motivation is somehow similar to that underlying developments in the U.S.

The search for economically and sociologically satisfactory connecting factors may be found in the Swiss doctrine of "characteristic performance" (*charakteristische Leistung, prestation caractéristique*, under which contracts should in principle be governed by the law of the person (natural or legal) upon whom the burden of performance falls. Thus, the law of the seller should apply to sales, the law of the bank to banking operations, the law of the insurer to insurance contracts, the law of the place where the work is carried out to labor contracts, and so forth.[37] From Switzerland the doctrine of characteristic performance spread to other countries[38] and was recently accepted in the E.E.C. Convention (Rome, 19 June 1980) on the law applicable to contracts.[39]

Colo. L. Rev. 283 ff.. (1973); in Switzerland by Gutzwiller, "Von Ziel und Methode des internationalen Privatrecht," 25 *Ann. suisse droit int.* 161-196 (1968); in Sweden by Sundstrom and others in *Three Discussions on the Conflict of Law, Theory and Comments on Fundamental Principles* (1970): for a commentary, see Rheinstein in 21 *Am. J. Comp. L.* 174-181 (1973) and Lalive, supra n. 6 at 209 ff.; in Turkey by Gündüz-Okçün, *Trans-Municipal Law, A Critical Analysis of Private International Law* (1968), discussed by Lalive, supra n. 6 at 213 ff. As to judicial practice, see the judgment of the German Constitutional Court (*Bundesverfassungsgericht*) of 4 May 1971 in the *Garcia* case, commented on by various authors in 36 *RabelsZ* 1 ff. (1971). See also the judgment of 11 July 1968 of the Swiss Federal Tribunal in the *Cardo* case: 103 *Clunet* 449 ff., note Lalive (1976).

36. Mainly contracts, torts and certain aspects of family law.

37. On the Swiss doctrine of characteristic performance, see Schnitzer, *Handbuch des internationalen Privatrechts* I, 52 ff. and II, 639 ff. (4th ed. 1957-1958); Vischer, *Internationales Vertragsrecht. Die Kollisionsrechtlichen Regeln der Anknüpfung bei internationalen Vertragen* (1962) 108 ff.; id., "The Antagonism between Legal Security and the Search of Justice in the Field of Contracts," 142 *Rec. Cours* 1-70 at 60 ff. (1974). According to Vischer (*Int. Vertragsrecht* 108) the law applicable under the principle of characteristic performance is the law of "the social order of which the economically or sociologically most essential obligation is carried out."

38. See art. 9 ff. of the Czecho-Slovak Law of 4 December 1963 and ¶ 36 ff. of the Austrian statute of 1978 (infra n. 43). In the absence of a contractual choice, both statutes specify the applicable law in accordance with the principle of characteristic performance. See also arts. 120-121 of the Swiss draft of 1978 (infra n. 51).

39. Under art. 3 and 4 of the E.E.C. Convention (not yet in force), in the absence of a choice by the parties, the contract is governed by the law of the country with which it is most closely connected. This is presumed to be the law of the country of habitual residence of the person obligated to give the performance which characterizes the contract (or, in the case of a legal entity, the law of the place where its head administration is located). If no characteristic performance can be established, the

Another trend detectable in Europe, but not only there, relates to the protection of the weaker party in a legal transaction. Thus, one applies the weaker party's personal law (which may be, in turn, the law of nationality, domicile, residence or habitual residence, according to the connecting factor adopted for the various types of legal transactions) and jurisdiction is attributed to the courts administering such law.

In the field of contracts, the protection of the weaker party applies, for instance, to consumers. It has the effect: a) of limiting the parties' choice of the law applicable to the contract by disallowing deprivation of the protection of the law of the state of the consumer's habitual residence; and b) of recurring, in the absence of a choice, to the law of the consumer's habitual residence, thus ruling out any other subsidiary connecting principle such as the place of conclusion or performance, and even the recently developed principle of the place of characteristic performance.

Recent examples of the above trend may be found in the previously mentioned E.E.C. Convention of 1980,[40] in the UNCITRAL draft on international sales, which was adopted by the Vienna Conference of the United Nations on 10 April 1980,[41] as well as in the text on consumer protection approved at the 14th Hague Conference of Private International Law.[42] As an example of national legislation, one may refer to the Austrian Statute on Private International Law of 15 June 1978.[43]

The principle of protecting the weaker party has been adopted by some recent legislation also in the field of family law. Thus paternity and the legal relationships between parents and children are governed by the child's national law under art. 23 ff. of the Czechoslovak Law of 4 December 1963, art. 19 of the Polish law of 12 November 1965 and ¶ 21 and 22 of the Law of 5 December 1975 of the German Democratic Republic. ¶ 46 of the Yugoslav Decree Nov. 13 of 1979 submits the said relationships to Yugoslav law if it is more

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presumption does not apply and the judge must find out directly which is the country with which the contract is most closely connected. The Convention also establishes rebuttable presumptions as to the law which is most closely connected to contracts relating to immovables and carriage of goods.

40. See n. 39.

41. See Document 80-38311 of the General Assembly, especially art. 2.

42. The Final Act of the 14th Session of the Conference (signed at The Hague on 25 October 1980) contains a Decision (at 34 ff.) concerning consumer sales, which is either to be included in a proposed revision of the Convention of 15 June 1955 on the law applicable to international sales of goods, or to be used for a separate convention on the law applicable to consumer sales.

43. See Duchek-Schwind, *Internationales Privatrecht* 90 ff. (1979). For an English translation of and commentary on the Statute, see Palmer, "The Austrian Codification of Private International Law," 28 *Am. J. Comp. L.* 197-221 and 222-234 (1980).

favorable to the child.[44] Some other laws consider that the weaker party is, in certain instances, the mother. Art. 311-14 of the French Civil Code (Law of 3 January 1972) provides that the status of children, both legitimate and illegitimate, must be established under the mother's personal law. ¶ 22 of the Austrian Law of 1978 provides that the status of natural children is governed by the mother's law.

The tendency to take into consideration the parties' interests in the application of a specific law shows that European countries now pay greater attention to the social realities underlying legal developments. In other words, also within the framework of traditional conflict systems, one can perceive a sort of interest analysis, albeit private interests, when shaping the conflict rule. Obviously this is quite different from what the governmental interest theory advocates: according to Currie the applicable law must be determined at the moment of the court's decision by weighing up the conflicting interests of various states. However, there are some common features to the technique of analyzing and evaluating interests.

Another important feature characterizing recent European developments in our field is the search for greater flexibility in the working of the conflict rule. In this context, one could refer to the softening process, *Auflockerung*, in German-speaking countries. But since this aspect is dealt with in other reports, it may be left aside here.

The tool adopted by a number of European codifications and conventions in order to attain flexibility is to apply the law with which the case is most strictly connected. There are several meanings of the "closest connection" principle. Thus the Austrian Law of 1978 adopts (¶ 1) what it calls the "strongest connection" *(stärkste Beziehung)* as a general principle, under which the individual provisions of the Law should be interpreted. The expression "strongest connection" somehow preserves the traditional Savignian approach of applying the law of the "natural seat" to each legal relationship. The provision of ¶ 1(2) of the same Law, under which "the special rules" of the Law itself must be considered as "expressions" of the same principle, leaves it open whether the principle in question should be used only to interpret the special rules and to fill the gaps, or whether it may also be used to interpret such rules when they conflict with it.[45]

Most statutes refer to the closest connection only with regard to

44. Also the 1970 Brasilian draft of a "Codex on the Application of Legal Rules" (by Valladão) submits (see ¶ 41) the relationships between parents and children to the law which is most favorable to the child of the following laws: the father's, mother's or child's national law, or the law of their domicile or residence.

45. On the various points of view in relation thereto, see Palmer, supra n. 43 at 205.

specific topics or particular instances. Under the Benelux draft (art. 13), contracts are governed by the law chosen by the parties and, in absence of such choice, by the law of the country with which the contract is most closely connected.[46] A similar provision is to be found in the E.E.C. Convention of 1980, which however contains additional specifications.[47]

The principle we are discussing has been used by some other countries in relation to family matters. In Switzerland, a Law of 25 June 1976 provides that with regard to recognition and disavowal of paternity, jurisdiction and the applicable law must be determined by the domicile common to parents and child; such a rule however may be superseded if the case is more strictly connected to the law of another country.[48] In Portugal, a Decree of 25 November 1977 submits relationships between spouses, as well as paternity and relationships between parents and children, to the law of the place of habitual residence; if there is no such connection however, the law of the country with which family life is more closely connected comes into play.[49]

In the 1978 draft of a Swiss Federal Law on Private International Law, choice-of-law provisions are generally intended to select the law of the state with which each type of case possessing a foreign element has the "closest connection" *(die engste Verbindung)*. In addition, art. 14 of the draft allows exceptions to its rules if the facts of a particular case "bear a closer relationship" to a law other than that indicated by the rules. The Swiss draft makes it clear (different from the Austrian Law of 1978) that the principle of the closest connection not only represents a guideline for interpreting the rules specified therein, but may also be used for derogating—albeit in extreme cases, as stated in the final report of the draft—from the rule in question.[50]

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46. The Benelux draft of a uniform law on Private International Law (1951; new version: 1969) was abandoned in 1975 by decision of the Interparliamentary Council of Benelux.

47. See n. 39 supra.

48. The Swiss Statute of 25 June 1976 (abrogating and substituting art. 8 of the Law of 25 June 1891 on civil law relationships of resident or visiting citizens) provides that Swiss judges have jurisdiction in paternity cases if the child, the father or the mother are domiciled in Switzerland. Jurisdiction should not be exercised if the case is most closely connected to another law that does not recognize the Swiss court's jurisdiction (art. 8d). The applicable law is that of the common domicile of father, mother and child or, otherwise, Swiss law; if the case is more closely connected to another country, the law of such country will be applied (art. 8e). See Vitta, supra n. 6 at 176.

49. Under the Portuguese Decree of 25 November 1977 (modifying the Civil Code of 1967) relationships between spouses are submitted to the law of their common nationality or their common habitual residence and, absent these, to the law of the country with which the family is most closely connected (new art. 6, ¶ 2).

50. The German and French texts of the draft and the accompanying Report (by

In their search for flexibility, all the above-mentioned enactments are somehow connected, notwithstanding their peculiarities and differences, to the "most significant relationship" theory. This appears to be the most popular American theory in Europe, because the tradition of selecting the law applicable to cases with foreign elements by using appropriate connecting factors is strongly rooted in European theory and practice. Hence, when the need for greater flexibility in the conflict rules was felt, the choice was to adopt flexible, rather than rigid, connecting factors. Thus flexibility was obtained without disavowing—at least not too much—the traditional approach.

Lessons from the American Experience

While the objections to wholesale reception of American conflict theories in Europe seem justified, there are some lessons to be learned from the American experience.

An indiscriminate acceptance of one American theory or the other would run into a number of serious objections. These theories have evolved in a setting very different from ours[51] and disregard the principle of certainty of the law to an extent considered unacceptable by a vast majority of European scholars.

But while the European systems are likely to continue to adhere to the traditional method of solving conflicts problems, their conflict law is not immutable and crystallized in its present form. Any legal system must evolve to take into account new needs and changing realities. These changes should be acknowledged by conflict scholars. In fulfilling this task European scholars should attempt to evaluate what is useful about American precedents and ideas. It is not enough to state that the study of such precedents and ideas "broadens our horizons"[52] or that the "enormous intellectual effort" invested therein[53] provokes our admiration. It should be recognized that a critical appreciation of American developments may provide better understanding of similar European developments.

In Europe, legal doctrine and practice have progressively abandoned the positivistic stance that prevailed in the first half of the

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Vischer and Volken) are published in 12 *Schweizer Studien zum internationalen Recht* (1978); the Final Report (only in German) appears in vol. 13 (1979) of the *Studien*. The French and German texts are also reproduced in 68 *Rev. crit. d.i.p.* 185 ff. (1979) and in 43 *RabelsZ* 246 ff. (1979) respectively.

51. See Evrigenis, supra n. 6 at 394-395. According to this author, a transfer to Europe of American proposals on solving conflict problems would be fictitious and antihistorical.

52. See Kegel, supra n. 6 at 263.

53. See Evrigenis, supra n. 6 at 394.

century. Greater attention is now paid to the social realities underlying legal developments. This is true for conflict rules as well, as is shown by the tendency increasingly to take into consideration the interests of the parties in applying one or another law connected to the case.

Second, we believe that American precedents may be usefully considered in revising specific aspects of conflicts theory and practice in Europe. The case law method prevailing in the U.S. has produced conflict systems much more detailed than those obtaining in Europe, especially so far as codified systems are concerned. Since the trend of recent European codifications of this branch of the law is towards greater specificity,[54] American precedents may be usefully considered.

Let us take an example. Dissatisfaction with the hard and fast traditional conflict rule which submits all issues presented by a tort case to the *lex loci commissi delicti* was one of the reasons, possibly the principal one, for the American "conflict revolution." By now dissatisfaction with that rule has become widespread in Europe as well and there is a tendency to distinguish among various types of torts.[55] That tendency may well have been fostered by study of developments in the U.S., and American precedents may be a valuable asset in improving tort choice-of-law in Europe.

Third, it is a fact that legal doctrine and practice in Europe have retreated from the earlier excesses of dogma and seek more flexible answers to legal problems. This is noticeable in all branches of the law, including the law of conflicts. In fact, this "softening of concepts" process, taking the form of substitution of "soft" for "hard" and of "flexible" for "rigid" connecting factors, has been considered the dominant feature of contemporary Private International Law.[56] Such a "softening" process characterizes all of the American conflict theories. European scholars might then profit from the perspectives afforded by American proposals and experiences.

How much of the "softening" process should we accept? This is a crucial question as in my opinion a balanced answer needs consid-

54. All the new European conflict laws are more detailed than those previously in force; see the Spanish law of 1974, the D.D.R. law of 1975, the Austrian law of 1978, the Swiss draft of 1978, and so on.

55. Various recent enactments—such as the Polish Statute of 1965 (art. 32), the Portuguese Civil Code of 1966 (art. 45), the D.D.R. Statute of 1975 (¶ 17), the Austrian Statute of 1978 (¶ 37)—specify that torts are, in principle, governed by the law of the place where committed. However, if the tortfeasor and the victim share the same national law or domicile, that law applies. The tendency to distinguish among the various types of torts may be seen in the two recent Hague conventions on Responsibility for Road Accidents (26 October 1968) and on Responsibility for Products (21 October 1972); see also art. 132 ff. of the Swiss draft of 1978.

56. See Kahn-Freund, supra n. 33 at 406 ff.

eration of two opposing requirements. On the one hand, historical reasons and legal conceptions prevailing in Europe require that conflict rules continue to be considered full-fledged rules (not mere suggestions) designed to decide future cases. It is therefore necessary to provide in advance for the choice of law to be made in relation to abstractly described types of conflict cases. On the other hand, the justified demand to "soften" such rules to meet changing conditions should be encouraged, so long as it does not deprive the conflict of laws of its character as a body of legal norms.

We have seen that a number of recent European enactments have variously answered the questions of how rigid and flexible factors should be combined and what should be the scope of the latter. To my mind a complete substitution of flexible for rigid factors would impair the nature of the traditional conflict rules as rules making definite provisions for the future. It then appears preferable to continue to submit cases with a foreign element to the law indicated by a specific connecting factor. However, if such a factor does not work (e.g., the parties have not chosen the law applicable to their contract or, in family matters, the national law of the parties, or one of them, cannot be applied because of statelessness), then a way out may be found by including in the conflict rule an alternative, more flexible, factor. Thus the conflict rule could refer, for instance, to the law of the state with which the contract, the person or the family is most closely connected. The degree of flexibility may be reduced, when appropriate, by introducing in the conflict rule several connections, successively indicating specific laws (e.g., the law of nationality or, absent nationality, the law of domicile or, further, for persons without nationality and domicile, the law of their residence or habitual residence). For residual cases in which none of these connections exist, a flexible factor, e.g. the law of the place to which the contract, the person or the family is most closely connected, may be appropriate.

Recent Developments in the U.S.: Towards Bridging the Gap?

While there is in Europe a trend towards greater flexibility, an inverse process appears to be at work in the U.S. There the "softening" of conflict rules has been pushed very far indeed.

It is true that the Second Conflicts Restatement attempts to make the "most significant relationship" idea more concrete by affirming a set of black letter, *prima facie* rules and a series of factors to be considered by judges in deciding which law is most closely connected to the case. These factors however, besides being rather vague, constitute only an indication of how the judge should approach the question, without definitely providing which is the appli-

cable law. Also, they must all be considered on the same footing, i.e. without any indication of an order of preference.[57] Still, these factors somehow resemble our traditional connecting factors.

The distinguished proponent of the "most significant relationship" has gone farther than that. Prof. Willis Reese has expressed the hope that, after a period of experimentation, it should be possible to replace inadequate conflict rules with new ones of more restricted scope, which would be in tune with actual developments.[58] In other words, after a first phase in which traditional conflict rules are demolished, followed by a period of experimentation, inchoate rules should develop, in order to return gradually to a new set of full-fledged conflict rules of the old sort.

Other American theories have undergone a similar metamorphosis. Thus followers of the governmental interest theory, including Prof. Brainerd Currie, to overcome the difficulty of establishing which are the states "legitimately" interested, have suggested a series of factors designed to help find the appropriate connection.[59] Prof. David Cavers has transformed his earlier "better law" theory into a series of "principles of preference" which, although leaving room for independent interpretation, should guide the judge in choosing the applicable law.[60] Finally Prof. Albert Ehrenzweig, in later developments of his thought, admitted the possibility of jurisprudentially-created "true rules," both "formulated" (when exactly defined) and "non-formulated" (when gleaned from actual practice); only in the absence of such rules should courts resort to the *lex fori* and its policy to see whether it or some other law should apply.[61]

Let me conclude by expressing the hope that the softening of the hard and fast traditional conflict rules to be noticed in some European systems may develop further, so long as it does not contradict the basic nature and character of conflict rules; and that, in the meantime, the excessive looseness in solving conflicts of laws in the U.S. may give way after a period of experimentation to progressively more definite and stable solutions.[62]

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57. Nine such factors have been proposed by Cheatham & Reese, "Choice of the Applicable Law," 52 *Colum. L. Rev.* 959-982 (1952), while Leflar, *American Conflicts Law* 193 ff. (3d ed. 1977), reduces them to five. A list of seven factors may be found in art. 6 of the *Restatement, Second, Conflict of Laws* (1971).

58. See Reese, "Choice of Law: Rules or Approach?," 57 *Corn. L. Rev.* 315-334 at 333 ff. (1971-1972).

59. See Currie, supra n. 3 at 147 ff., where the factors proposed are stated in abstract and rather complicated formulas of a quasi-mathematical character.

60. See Cavers, *The Choice-of-Law Process* (1965); "Contemporary Conflicts Law in American Perspective," 131 *Rec. Cours* 75-308 at 151 ff. and 225 ff. (1970); *Addendum* to the article of 1933 (see n. 1) in Picone & Wengler, *Internationales Privatrecht* 166-172 (1974).

61. See Ehrenzweig, supra n. 26 at I, 85 ff.

62. For discussion of a possible "rapprochement" between European and U.S.

It might thus be possible to come gradually to at least a degree of "rapprochement" between European and American systems, which would be a very positive development. In a world in which transnational contacts multiply daily, it is important that this aspect of international legal intercourse should be governed by similar processes.

conflict methods, see Ferrer Correia, supra n. 6 at 82 ff. Prof. Ferrer Correia expresses confidence that, after the initial radicalism of opposed views is over, it will be possible to find common ground.

OLE LANDO

New American Choice-of-Law Principles and the European Conflict of Laws of Contracts

Introduction[1]

Some of the characteristics of the American jurisprudence of this century have been its realism, its capacity for new thinking and its frequent advocacy of reform. It has endeavoured to look upon society as it is, and not as it appears through the smoke-coloured spectacles of legal tradition; it has made frequent use of economics, sociology and other social sciences to consider innovations; the American jurists have been among the front runners of those who have fought for social and legal reform.

This realistic and reformatory spirit has also penetrated into the theory of the conflict of laws. Here the traditional American jurists adhered to the venerable principles of the territoriality of laws and vested rights. These axioms among others had been adopted by Joseph Beale, the reporter of the first Restatement on the Conflict of Laws, who in his writings and in the Restatement applied his principles with the remorseless logic of a civil law jurist. In the twenties and thirties there was a glaring contrast between Beale's classical thinking and the philosophy of the modern realists.

American Law before the New-Thinkers[2]

When the First Restatement was published in 1934 a system of inflexible rules was followed by the courts of a majority of the states. They either applied the law of the place of contracting or the law of the place of performance. In doing so, they acted under the influence of the Dutch writers of the seventeenth century, in particular Huber and Voet, of the English cases and of American authors such as Kent, Story and Beale. This main trend was made up of two variants: some decisions following Story applied either the law of

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1. See Audit, "A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles," with Comments by von Mehren and Juenger, in 27 *Am. J. Comp. L.* 589 ff. (1979).

2. For a more careful analysis of American law, see *International Encyclopedia of Comparative Law*, Vol. 3, Private International Law, Ch. 24, Contracts, §§ 45-50, and 132-141.

the place of contracting or the law of the place of performance to the contract. Commonly the intention of the parties, actual or presumed, was found to support the choice of one or the other of these laws. Other decisions followed the theories of Justice Hunt in *Scudder v. Union National Bank of Chicago*,[3] and later on of Beale; they split the contractual problems into two parts: the formation, interpretation and validity of the contract were governed by the law of the place of contracting; the performance of the contract was governed by the law of the place of performance. This approach was followed by the Restatement (1934).[4]

In the period before the publication of the Restatement in 1934 the first variant was adopted in the majority of cases. Afterwards decisions agreeing with the second variant became more numerous. Of about 150 American decisions dating from the period 1945-1962 which were examined by the present writer, more than half clearly followed the rules of the Restatement (1934) and nearly half of the decisions cited Beale or the Restatement (1934). Among the rest of these cases some clearly followed Story and applied one legal system to the contract as a whole. Some of these decisions, however, which followed the Restatement (1934) were compatible with the theory of Story as well as some which cited him together with the Restatement (1934) or with Beale.

Of the minority of cases that did not clearly follow the main trend in either of its variants, a few did not reveal the grounds upon which they were decided. One fourth or one fifth of the cases clearly deviated from the main trend and these often posed real conflict problems because the conflicting laws differed on the point in issue. The deviations did not always follow state lines.

Among the deviations from the main trend are those cases that paid lip service to the traditional rules but which in fact followed

3. 91 U.S. 406 (1875).

4. *Restatement* (1934) § 332: "Law Governing Validity of Contract. The law of the place of contracting determines the validity and effect of a promise with respect to (a) capacity to make the contract; (b) the necessary form, if any, in which the promise must be made; (c) the mutual assent or consideration, if any, required to make a promise binding; (d) any other requirements for making a promise binding; (e) fraud, illegality, or any other circumstance which make a promise void or voidable; (f) except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound; (g) the time when and the place where the promise is by its terms to be performed; (h) the absolute or conditional character of the promise."

§ 358: "Law Governing Performance. The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to (a) the manner of performance; (b) the time and locality of performance; (c) the person or persons by whom or to whom performance shall be made or rendered; (d) the sufficiency of performance; (e) excuse for non-performance."

other principles than the principle of territoriality of laws.[5] An openly admitted deviation from the main trend was the adoption of the so-called centre-of-gravity method, first used by the federal courts and the courts of New York State. By this method the courts searched for the state or the country having the closest factual relationship with the subject matter. However the decisions did not indicate uniformly whether regard must be paid to the most significant relationship of the *contract* with a particular state or country or to the preponderance of interest by a state or country in the individual *issue* involved.

The Contribution of European Law of the 19th and early 20th Century

The methods and rules which Beale and his followers had established were so obsolete that the approaches which came to replace them became revolutionary. The new-thinkers not only swept away the territoriality principle, the vested rights theory, and the hard and fast rules to which their predecessors had adhered. They tore down the entire structure of the conflict-of-law rules. Thereby they alienated themselves not only from Beale and his like-minded colleagues, but also from the European doctrines of the conflict of laws.

In the first half of this century the legal systems of Europe may not have had much to offer the Americans. This holds true in particular of the European theories and practices respecting the conflict of laws of contracts. The Europeans faced two main problems. One was whether and to what extent the parties were free to choose the law applicable to the contract. The other was which conflict-of-law rules to apply in the absence of an effective choice of law by the parties. As to the first problem confusion reigned in Europe, especially on the Continent. There was a cleavage between the writers and the courts. The writers opposed party autonomy. The argument was that the law must prevail over the will of the parties. The intention of the parties, they said, was incapable from a logical point of view of selecting the governing law because there did not exist any legal system which gave effect to that intention; moreover the scope of the substantive rule of law was for reasons of policy not to be enlarged or curtailed by the parties. It was left to the sovereign to decide that scope according to the social purposes of the law. The courts nevertheless gave effect to the choice of law by the parties. They endorsed an almost unfettered freedom. European courts had not—and some have not yet—realized that changing social and economic conditions might lead the courts to give up the *laissez faire* of

5. The fact of this lip service has been noted by several American authors, see e.g., Ehrenzweig, *A Treatise on the Conflict of Laws* 465 (1962).

the 19th century. Freedom of contract had already then been substantially curtailed and this should have had some impact on the freedom of the parties to choose the applicable law.

As for the second problem, the law applicable in the absence of an effective choice of law by the parties, the European picture was unclear. Very few countries had any legislation on the subject. There was much writing but little agreement among the authors. The courts of England, France, Germany and a number of other countries paid lip service to the presumed intention of the parties. The law of the contract was the law by which the parties might fairly be presumed to have intended the contract to be governed. Relying on the test of presumed intention the courts were able to treat each contract individually. However, their application of the presumed intention showed no clear picture. In most of the countries no rules or even presumptions were established; there was a veil of mist around the reported cases. In most of the European countries it was, as Beale[6] said in his comment on English case law, remarkable to notice the great regularity with which the courts found, by various methods, that it was the law of England which was intended by the parties. The law of the forum, however, was not applied in every case. Although the homeward trend was the only true common core of the legal systems, even that varied from court to court and from country to country. It was perhaps stronger in the big countries, England, France and Germany, than in the smaller ones such as Switzerland, the Netherlands and Scandinavia.

One cannot blame the Americans that in the European fog they did not see the light.

The American New-Thinkers

In 1933 Cavers showed that the courts of the United States had not allowed the elements of contact alone to determine the law applicable.[7] Very often they considered the results which the application of the various laws would produce. A certain connecting factor was employed because it gave the court the opportunity to apply the law of the state or country to which it pointed, but this was not in fact an automatic application of a choice-of-law rule. The courts often found that by a happy coincidence the established conflicts rule promoted justice, but when, in their opinion, it did not, they established another in its place. They pretended to ask the question: which is the decisive connecting factor? However, they were aware of the fact that the real question for consideration was different.

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6. Beale, *A Treatise on the Conflict of Laws* II-1102 (3 vol., 1935).

7. Cavers, "A Critique of the Choice-of-Law Problem," 47 *Harv. L. Rev.* 197-208 (1933); see also id., *The Choice-of-Law Process* (1965).

Cavers approved of the results of the decisions reached by the American courts but disapproved of their distortion of reality. In his opinion the outcome of each case should turn upon a scrutiny of the events of the transaction giving rise to the issue and on a careful comparison of the results that might be reached under foreign law with those that the law of the forum would produce. The court should appraise the significance of the connecting factors in light of the competing substantive rules. Cavers was inclined to allow the court more liberty to decide a case on its actual merits than previous writers had done, but he did not recommend an approach which abandoned principle and precedent. He wanted the court to take into consideration whether it was expedient to establish a particular solution as a rule of law. Such rules might be framed as rules for solving conflicts between substantive rules of certain jurisdictions and, sometimes, as general rules governing certain issues, such as the rule of validation in cases concerning usury.

In his later writings Cavers established, by way of example, two rules of preference governing contractual matters. One was a rule protecting the weak party against the adverse consequences of unequal bargaining power when such protection was offered by a law having a specified connection with the transaction,[8] and the other a rule affirming the principle of party autonomy for other cases.[9] In doing so Cavers disavowed a result-selective approach which would disregard the significance of the connecting factors and simply choose the substantive rule that best accords with today's ideas of justice and convenience. However, the principles of preference he proposes are to be based upon some—as he hopes—universally recognized value judgments.[10]

Several authors such as Cheatham and Reese, Leflar and Wein-

8. Id., *Choice-of-Law Process* 181: ". . . Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law."

9. Id. 194: "If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interest created run counter to applicable mandatory rules of the situs of the land. The principle does not govern the legal effect of the transaction on third parties with independent interests."

10. Id. 122.

traub have emphasized that among choice-influencing factors a court should be allowed to take into consideration that rule of a particular system of laws, among several which may be applicable, which is "in tune with the times"[11] or, as Leflar has it, "the better rule of the law."[12] Although by 1973 many courts had in fact followed the method proposed by Cavers in his article of 1933, only a few courts had openly adhered to this method.[13]

Currie's theory has had several followers among writers and by the beginning of the 1970s some among the American courts.[14] The theory briefly stated is based on three cornerstones, the existence of true conflicts, of governmental interests and of the preponderance of the *lex fori*.

Currie was chiefly interested in what he called true conflicts. They occur when the laws of two or more states are potentially applicable to the subject matter, and each of them has a governmental interest in the application of its laws. This interest is to be ascertained through an inquiry into the policies of the laws of the respective states. By the ordinary process of construction and interpretation of the competing rules the court must ascertain whether the purpose of each of these laws is advanced by application in the case. There is a false conflict if one of two states—whether the state of the forum or a foreign state—has a governmental interest and the other has none. Then the law of the interested state applies.[15]

A true conflict arises when two or more states have a domestic policy that would be advanced by application to the case and these policies clash. In such cases Currie would let the law of the forum govern. This applies to the usual case where there is a conflict between the law of the *forum* and some foreign law or laws. It also applies to the more unusual case where the law of the forum is disinterested and the conflict arises between the laws of foreign states.[16]

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11. Cheatham & Reese, "Choice of the Applicable Law," 52 *Colum. L. Rev.* 959, 980 (1952); Weintraub, *Commentary on the Conflict of Laws* 4, 284, 294 (1971).

12. Leflar, *American Conflicts Law* 254 (1968).

13. See, inter alia, Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161 (1946) and Global Commerce Corp. v. Clark-Babbitt Industries, 239 F.2d 716 (2 Cir. 1956).

14. Currie, *Selected Essays on the Conflict of Laws* (1963), *passim*; see also a brief statement of Currie's theory in Reese & Rosenberg, *Cases and Materials on the Conflict of Laws* 523 (6 ed. 1971), and Heini, "Neure Strömungen im amerikanischen Internationalen Privatrecht, 19 *Schw. Jb. Int. R.* 47 (1962).

15. Currie favored a "moderate and restrained" interpretation of the law of the forum so as to avoid conflict with an interested foreign state, see Currie's opinion in Cavers, *Choice-of-Law Process* 52 in which he approves of Justice Traynor's moderate construction of a California rule of law in Bernkrant v. Fowler, 55 Cal. 2d 588, 366 P.2d 906 (1961).

16. Currie was also in favor of applying the solution of the interested state, if it

Currie admitted that his theory would lead to different solutions of the same problem depending on where the action was brought. If with respect to a particular problem this appears to be a serious infringement of a strong national interest in uniformity of decision, the court should not sacrifice the legitimate interest of its own state but should leave it to the Congress of the United States to use its constitutional power to solve the problem through legislation.

In solving true conflicts von Mehren and Trautman are, as was Currie, concerned about finding the state interests behind the substantive rules or, as they term it, to apply the rule of the jurisdiction predominantly concerned. They do not seem to give the same priority to the law of the forum state as did Currie and they are more interested in what they call multijurisdictional considerations for the solution of cases where two jurisdictions are equally concerned about the issue.[17]

The Influence of the American New-Thinkers in Europe

As far as the conflict of laws of contracts is concerned, it has not been possible for me to trace any influential or significant follower in Europe of the new American theories. I have not found any writer of reknown who in this field has seriously advocated replacement of the traditional structure of the conflict-of-law rule with the new structures proposed by Cavers, Currie and other Americans of the same schools. Why have these ideas had so little impact upon European thinking? Although a number of European jurists may think in grooves, they are not *all* incapable of accepting new ideas.

The explanation is probably that the new theories have been difficult to apply to the European situation. This may be shown by a brief analysis of the theories of Currie and Cavers.

Currie's main point is that the relevant policies or the governmental interests behind the rule of substantive law determine its application in space. How is a court to proceed in applying this method?

Let us assume that country A has statutes prohibiting agreements between attorneys and clients for the payment of contingent fees. A brief statement in the *travaux préparatoires* condemns such agreements as dangerous and unethical; imprecise reasons of this nature are not uncommon. Relying on governmental interest analysis a court in country A is faced with difficulties. It may find that the object of the rule is to protect the client against being

coincided with that of the *lex fori*. He sometimes modified his theory. In one of his later articles he was inclined also to allow the choice of the better rule in this situation, see id. "The Disinterested Third State," 28 *Law & Contemp. Prob.* 754 (1963).

17. See von Mehren & Trautman, *The Law of Multistate Problems* 76, 408 (1965).

charged exorbitant fees. But it can hardly have been the purpose of the rule to protect all clients in the world. Following general rules of interpretation and construction it may then maintain that the rule should apply to agreements between attorneys and *domestic* clients. One may, however, question whether this limitation to domestic clients is justified. Why not protect a foreign client who has made an agreement with a domestic attorney to act in a case before the courts of A? And is it right to extend the rule to all domestic clients? Such protection might prevent clients of country A from litigating in country B where they cannot obtain legal aid and where the contingent fee agreement is the only device available to a poor client for bringing an action.

Frustrated by these doubts the court may hold that the rule must extend to all attorneys who have been admitted to the bar of country A on the ground that its aim is also to protect the ethics of the bar. Here again doubts arise. Why only protect the ethics of domestic attorneys? And should the attorneys of country A when engaged in business in country B be prevented from acting there on an equal footing with their colleagues in B who use the contingent fee?

As we have seen, the courts of country A face great difficulties in applying a governmental-interest approach. The problems facing the courts of other countries when confronted with these statutes are even greater.

The example serves to illustrate that the purpose of a statute or other rule of law is sometimes obscure. Sometimes it is also complex. Even when the purpose of the statute is known and straightforward, its application in space is doubtful. Very often it depends on general policy considerations applicable to a large number of substantive rules governing the same contract. One of these is to determine the economic and social center of the contract.

It is submitted that not only the governmental interests behind the substantive provisions, but also other considerations must be taken into account.[18] Among these, what have been called the rules of the international system figure prominently.[19] A country which, for instance, has been inimical to commercial arbitration may have enacted rules preventing its citizens and domiciliaries from agreeing to certain arbitration clauses. However, if these rules are extended to international contracts the result will be that on international markets the citizens of that country will find their position weakened.

Finally, if the application in space of each substantive rule were to be determined separately by the courts, the parties would not be

18. See Cavers, *Choice-of-Law Process* 100.
19. See Restatement 2d (1971) § 6(2)(a).

able to predict their application. When making the contract the parties cannot foretell the issue of a future dispute between them and therefore cannot foretell what conflicting rules will be pleaded, what are the conflicting governmental interests behind these rules and which rule will be applied in the end. A conflict rule which covers most aspects of the law of contract and is not restricted to a particular issue will enable the parties better to predict what law will apply.

Cavers' main concern is to promote the attainment of justice. The outcome of each case should turn on scrutiny of the facts of the transaction giving rise to the issue and on careful comparison of the outcome that might be reached under a foreign law with that which the *lex fori* would produce. The court should weigh both the connecting factors and the competing results of the substantive laws in conflict. In so doing the court should take into consideration whether it is expedient to establish a rule of law. Cavers himself establishes a few principles of preference in contractual matters.

The question is whether Cavers' doctrine is capable of being put into practice. His two principles of preference mentioned above, though aimed at covering a relatively large area of the conflict of laws of contracts (and property), still leave a substantial area uncovered by rules, especially in the province of international commercial contracts where protective laws are not in issue—or should be disregarded—and where the parties have made no agreement on the applicable law. So far it has not been shown how this method could be utilized on a larger scale. The courts have established only very few conflicts rules of a teleological character. Were Cavers' method to be adopted in international conflicts of laws it would require the establishment of a larger number of principles governing the choice of law of contracts. It would be necessary to examine and compare the substantive contract law of a great number of countries before a comprehensive set of principles could be developed. These principles would very likely be more detailed than Cavers' two principles, based as they are on the fairly homogeneous American substantive laws. A great number would be necessary and they would be difficult to formulate. The effort required would be very great in proportion to the number of conflict cases that arise. The degrees of success attained through an endeavour of this kind would turn on the degree to which scholars in various countries could agree on the principles to be established, and would depend upon whether legislatures and courts throughout the world were willing to adhere to them. General agreement is more likely if the rules for choice of law accord equal scope to the substantive law of each country than if they discriminate, for example, between laws offering a "higher"

and "lower" standard of protection.[20]

In the United States a relatively uniform basis will better ensure that the exercise of such pragmatic judgments does not differ so much from state to state as could be expected between country and country in Europe and in other parts of the world. A federal system could much facilitate the adoption of a given policy; but Europe is not yet organized as a federal system.

A Cross-Breed between Old and Young: Second Restatement

The approach of the American Law Institute in the Restatement 2d (1971) is very different from that of the Restatement (1934). The rigid rules have been replaced by flexible standards. In the case of contracts the Institute has chosen a compromise between reliance on the center-of-gravity theory proposed by the 1960 draft of the Restatement 2d (1971) and the methods advocated by Cavers, Currie, Leflar, von Mehren and Trautman, Weintraub and other protagonists of a policy-centered approach.

Restatement 2d (1971) § 6, which lays down general principles determining a choice of law, also supplies the standards applicable to contracts. Among them are the factors which the new-thinkers consider relevant to the choice of the applicable rule of law.[21]

§ 188 on the law governing in the absence of an effective choice of law by the parties provides in subsection (1) that the rights and duties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6. According to § 188(2) the contacts to be taken into consideration in applying the principles of § 6 to determine the law applicable to an issue include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

So far the particular issue is the primary concern. Beginning with § 188(3) however, a shift of emphasis seems to occur: if the

20. See Currie 105.

21. *Restatement 2d* (1971) § 6: "Choice-of-Law Principles. (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

place of negotiation and the place of performance are located in the same state the law of this state will generally apply unless otherwise provided in the following title B on particular contracts.[22] Title B (§ 189-197) contains a number of presumptions. Most of these are formulated as § 191 on Contracts to Sell Interests in Chattels which runs as follows:

> The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Here as in the other sections of title B the contract as such is the main object of regulation. The law of the place of delivery governs both the validity of the contract and the rights and duties of the parties unless the contract discloses a more significant relationship with another state with respect to the particular issue.

In the following title C dealing with particular problems it appears that most of these issues mentioned are to be governed by the law that has the most significant connection with the contract. The comment states expressly that the rules of title B which depend upon the type of contract provide a satisfactory basis for determining many of the questions that arise in contract, because most of them will usually be governed by a single law. On occasion however, it is said, an approach directed to the particular problem, rather than to the type of contract involved, will provide a more helpful basis for the determination of a problem of choice of law.[23] In the sections of title C most questions are determined by reference to the general rules set out in title B. Some special rules determine the law regarding capacity, formalities and usury, and these rules are validating rules supplementary to the general rules of contract.

The Restatement 2d emphasizes protection of the justified expectations of the parties as an important choice-influencing consideration.[24] In the comment it is said that these factors vary in importance. They are of considerable weight with respect to issues involving the validity of a contract, but play a less significant role with respect to issues touching the nature and obligations of the

22. And also in § 298 on capacity, § 199 on formalities and in § 203 on usury.
23. *Restatement 2d* (1971), Introductory note to § 198.
24. *Restatement 2d* (1971) § 188 comment b.

parties. Parties will expect the contract to be valid, but if they have not spelled out the obligations in the contract, they will not be disappointed by the application of the directory rules (for instance on the time and mode of performance) of one state rather than the rules of another state.[25] Hence in fashioning the choice-of-law rules concerning the rights and duties of parties to a contract which is valid, greater emphasis must be laid upon considerations other than the justified expectations of the parties. The relevant policies of the country of the forum and of other interested states, and the ease in determination and application of the law to be applied, may for instance have greater weight.[26] The comment, as is seen, gives these recommendations with great caution.

However, the rules of the Restatement 2d (1971) dealing with particular contracts and with particular issues of the contract do not provide for any major difference between validity and obligation. Most sections of title B concerning particular contracts start out as classical conflict rules in which operative facts are governed by the law referred to by a connecting factor, and then it is added: "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." Apart from this reference to § 6, specific government interests or other considerations are very rarely mentioned in title B and title C concerning particular issues. The presumptions stated in the rules may be stronger when a question of obligations comes up, but not much is said about the distinction in titles B and C.

To sum up: to a considerable extent the traditional conflict-of-law rules are retained in the Restatement 2d. The bow to the new-thinkers is found in § 6 and in the repeated references to this section in § 188 and in the following sections on contracts. The Restatement says, in other words: I have two recipes: one is the traditional conflict-of-law method. The other is the new approach. You are advised to use the first recipe unless you choose to use the second. The Restatement seems to use what George Orwell called "double speak."

In January 1981 I examined about 50 American cases, most of

25. The governmental analysis test may lead to the application of two different laws to the same relationship when two issues are involved in the same case. These issues may relate to two different claims under the same contract, e.g. a claim for specific performance and a claim for damages, or they may relate to the same claim, e.g. for damages. In the latter case Currie would apply one law only. You "cannot put together half a donkey and half a horse and ride to victory on the synthetic hybrid." What Currie would do if the two issues were related to two different claims we do not learn; see Currie in Cavers, *Choice-of-Law Process* 39.

26. *Restatement 2d* (1971) Vol. I § 188 comment b on subsection (1) (p. 577).

which had been decided in 1978, 1979 and 1980. I found that some state courts were still following the traditional rules of the Restatement (1934). Of the majority of courts which now applied the methods and rules of the Restatement 2d, most relied on the contacts of the contract only, thus following a center-of-gravity or grouping of-contacts test in the European meaning of these terms; that is, they applied the law of the state with which the contract had its closest relationship. From the reports of these cases I did not learn whether they presented "true" or "false" conflicts; on the basis of the contacts of the cases the court just held that the law of state X was applicable. A small minority of the cases analyzed the substantive rules of the two or more laws "in conflict" in order to apply the governmental-interest or the better-rule test. Some of these cases contained what the new-thinkers would call "real" conflicts. The parties had pleaded diverging substantive rules all of which probably "claimed application" to the issue and which would lead to conflicting results. However, it seemed that also here the courts applied the law which the (contact) rules of presumption recommended by the Restatement 2d would have led them to apply. I found only one case in which a state court applied forum law because it found it to be the "better law," and where, perhaps, it would have applied the law of another state if it had followed a grouping-of-contacts test.[27]

Such a review of cases is of course to be looked upon with some reservation. The case material was relatively small. I did not find all the reported cases of that three year period. All I can say is that in the cases I read the courts had not yet given the new-thinkers much reward for their great intellectual efforts. From earlier years, and maybe even from the years 1978-1980, there are more cases showing "real conflicts" in which either openly or through "covert techniques" the American courts have followed the theories of Currie, Cavers and other new-thinkers. These cases have been made well-known by the authors, who have criticized or praised the courts and who have shown how these courts have or ought to have confirmed their theories. However, numerically and for everyday use these cases do not count for much. They are the caviar for the gourmet jurist, not the trivial kipper which the ordinary counsel gets from his client.

The methods and rules applied by a substantial number of the American courts which have followed or invoked the Restatement 2d have a considerable similarity to those provided for in the EEC Convention on the Law Applicable to International Contractual Obligations.[28] Art. 4(1) of this Convention lays down that the contract

27. Hague v. Allstate Insurance Co., 289 N.W.2d 43 (1978), aff'd, 449 U.S. 302 (1981).
28. *O.J.* No. L 266/1 (1980).

shall be governed by the law of the country with which it is most closely connected. This principle and the rules of presumption attached to it in the other paragraphs of art. 4 and in other articles is gaining ground among European courts even before the Convention has come into force.

Whether in this respect America has influenced Europe or *vice versa* is difficult to tell. The center-of-gravity method was perhaps originally European. However, it could hardly have received such support in Europe if European scholars, led by the French author Henry Batiffol, had not seen it confirmed by so many American cases. Batiffol reached his theory on the localization of contract primarily through a careful study of what the American courts had done.[29] He paid less heed to what they, still then using the traditional formulae, had said.

A Limited European Parallel

After the Second World War the "dirigism" of modern states over national economies faced Europeans with the problem whether courts and legislatures should pay heed to substantive rules of a jurisdiction which claimed to govern an issue in contract with such resolution as to exclude the application of any other law. Such substantive rules may be found in economic legislation, for instance in exchange control regulations and cartel laws, and in laws protecting the consumer and other presumably weak contracting parties, such as employees, agents and sole distributors, against unfair contract terms.

Some European scholars have argued that courts and legislatures, while maintaining the classical structure of the conflict-of-law rules, should apply or "take into consideration" the rules of a jurisdiction which claimed to govern an issue in contract in the resolute way mentioned above. Such rules they called "directly applicable rules" or "lois d'application immediate."[30] The idea was that these rules operate immediately upon the issue. The conflict-of-law rule which would lead to another law on the issue is put out of action.

Hitherto such directly applicable rules have been applied when they formed part of the law of the forum state. In support of its application the courts in Europe have invoked public policy, the purpose of the rule of the forum, or other principles. Very seldom have such rules been applied when they formed part of a law other than that of the forum. Their application has therefore depended upon where the action was brought. This has sometimes caused forum

29. See Batiffol, *Les conflits de lois en matière de contrats* 3 (1938).
30. See Francescakis, *La théorie du renvoi*, no. 7ff. (1958).

shopping and uncertainty in international transactions. The new theory will give fair play also to foreign public policies.

One of the very few European cases in which the theory on the directly applicable rule was accepted, in a dictum, was the famous *Alnati* case,[31] decided by the Dutch Supreme Court in 1966. Here the court said that although the law applicable to contracts of an international character as a matter of principle can only be that which the parties themselves have chosen, "it may be that for a foreign state, the observance of certain of its rules, even outside its own territory, is of such importance that the courts . . . must take them into consideration and therefore apply them in preference to another law which may have been chosen by the parties to govern their contract." In the *Alnati* case, however, the Belgian Hague Rules in question were not applied. The Dutch law chosen by the parties was made applicable, although the contract was more closely connected with Belgium than with the Netherlands. The Belgian Hague Rules were obviously not considered to be so vital for the Belgians that they deserved application. In a later case, *Kharagitsingh v. Sewrajsingh*,[32] where the Dutch Supreme Court could also have referred to the doctrine of directly applicable rules, no mention was made of it.

The idea, however, has been adopted in art. 7(1) of the EEC Convention of the Law Applicable to International Contractual Obligations of 19 June 1980, by art. 16 of the Hague Convention of 14 March 1978 on the Law Applicable to Agency, and in art. 18 of the Swiss Draft Federal Law on Private International Law (1977).

Art. 7(1) of the EEC Convention provides that when applying the law of a country under the Convention, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if, and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard is to be given to their nature and purpose and to the consequences of their application or non-application.

There is some similarity between this provision and several of the factors relevant to the choice of the applicable rules mentioned in §§ 6 and 188 of the Restatement 2d. There are, however, also differences. The main difference is that § 6 and § 188 of the Restatement provide guidelines for the solution of all conflict-of-law situations involving contracts; art. 7(1) of the Convention is only an exception to the operation of the traditional conflict rule. However,

31. Hoge Raad, 13 May 1966, 1967 N.J. no. 3.
32. Hoge Raad, 12 January 1979, 1980 *Rev. crit. d.i.p.* 68.

as § 6 and § 188 have been applied by the American courts, the difference may not be so great as it seems. Further, the Restatement will consider the relevant policies of the interested foreign states and the relative interests of those states in the determination of the *particular issue* in contract, and when deciding whether the interest of a foreign state is worthy of consideration § 188 will weigh the contacts to the foreign state to be taken into account according to their relative importance with respect to the particular issue; art. 7 of the EEC Convention provides that "giving effect" to the mandatory rules of a foreign state is possible only when this state has a significant contact with the *contract as a whole*.

In spite of these and other minor differences between the American and European rules there is a similarity in the basic idea. The fertile American case law has provided and may provide examples which will teach the European courts when to apply art. 7 of the EEC Convention. Some of the much debated American cases involving "real" conflicts may provide food for thought.

Conclusions

As has been seen the present writer has had difficulties in accepting the new American theories. He has more belief in the methods and principles adopted by the EEC Convention of 19 June 1980. Under this Convention the contract is to be governed by the law of the country in which its center is located socially and economically. On the one hand the court is not bound to rely on one connecting factor for all contracts of a particular type. It may take the various connecting factors into consideration and consider them individually in each case. On the other hand the normal structure of the conflict rules is maintained. In general, only the connecting factors count. Furthermore, the connecting factors of the entire contractual relationship as a social phenomenon are taken into consideration and not the contacts relating to the particular issue.

The proper law of the contract is not to be ascertained by counting but by weighing the connecting factors. These factors derive their weight from the general social policies behind the substantive law rules and from the policies underlying international commercial intercourse, one of which is to consider the average interests of the parties. When weighing the factors the courts should consider these policies.

The law of contract, in so far as it deals with contracts relating to interests in immovables, is intended to apply to immovables situated in the country where these rules are in force, and the country in which an immovable is situated is, in general, more interested

than are other countries in having such contracts governed by its laws.

Equality of status among employees and peace of the labor market are ensured if all work carried out in the same country is governed by the same rules. Therefore the country where an employee carries out his work is generally more interested than are other countries in having its law govern the contract of employment.

The manufacturer or the merchant who exports goods is subject to more complex duties than the importer. An exporter who sells to importers in different countries has a greater interest than has the importer in calculating the risks and costs on the basis of one law, which is his own law.

The normal policy of a country whose law contains rules protecting the weak party to a consumer contract will be to extend this protection to its residents. This social policy is in general so important that the habitual residence of the consumer will be regarded as the center of gravity of a consumer contract.

These and other considerations attaching particular weight to a certain connecting factor or to a constellation of such factors are of a general kind. They cover most contracts of a certain type and sometimes several types of contracts. These general choice-influencing consideration will therefore lead to the establishment of presumptions for the various types of contracts and for typical contractual situations. Presumptions will perceptibly reduce the uncertainty and lack of predictability which are likely to result if the center of gravity or individualization without the assistance of presumptions is made the basis of the choice of law.

The main difference between the European grouping-of-contacts test and the new American theories is the following: the Americans consider the purpose or the social effects of each substantive rule in order to determine its spatial scope of application. The Europeans try to determine in which environment the entire contract as a social phenomenon is localized. In doing so they take into consideration the social and political interests which would normally govern a contract of that type and with these contacts.

If the EEC Convention is adopted in the Europe of the 10 (or 12), and if the Restatement 2d is applied in the future as it seems to have been applied in a substantial number of the cases hitherto decided under it, the conflict-of-law rules of the two continents will approach each other considerably. One day our successors may then meet again in Europe's oldest university and discuss the publication of an American-European Restatement on the Conflict of Laws.

KURT G. SIEHR

Domestic Relations in Europe: European Equivalents to American Evolutions

American Influences on European Private International Law

Formerly, private international law was a rather international discipline. Law courts of different countries referred to the same general maxims and authorities.[1] In this way similar if not identical

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1. See e.g., Bremer v. Freeman and Bremer, (1857) 10 Moo. P.C. 306; 14 E.R. 508 (P.C.), referring to Story; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241 (1878), referring to English cases and English literature (Westlake).

solutions were achieved in many jurisdictions, although the law of conflicts was not formally unified. Those times have gone. Today private international law is treated as a genuine part of domestic law. Common principles must be bargained for in international conventions and the discussion of foreign conflicts theories is mainly reduced to scholarly writing. This implies two conclusions for my subject: (1) American conflicts theories may directly influence European private international law by way of international treaties, drafted with American participation, entering into force in European countries; (2) any other American influence works indirectly through the media of legal writing and domestic legislation in Europe which advocate or adopt American models for domestic conflicts rules.

Direct Influences

In 1964 the United States joined the Hague Conference of Private International Law.[2] Since that time, i.e. since the 10th session of the Conference, the United States has taken part in the unifying endeavors of the Hague Conference as a full member, not only as an observer.[3] With American participation, the Hague Conference has prepared seven conventions in the field of family law, three conventions on marriage and divorce[4] and four on domestic relations in general or on problems of minors.[5] None of these conventions has been signed or ratified by the United States. In some European countries however, some of the conventions have already entered into force.[6] Instead of tracing the American influences on the final draft of each of these conventions separately, I will mention any di-

2. See Nadelmann, "The United States Joins the Hague Conference on Private International Law", 30 *Law & Contemp. Prob.* 291-325 (1965) = id., *Conflict of Laws—International and Interstate* 99-139 (1972).

3. The reports by Nadelmann & Reese, 13 *Am. J. Comp. L.* 612-615 (1965); von Mehren, Reese, Nadelmann, 16 *Am. J. Comp. L.* 580-604 (1968); Nadelmann, Reese, Cavers, 21 *Am. J. Comp. L.* 139-164, 593-595 (1973); Reese, 25 *Am. J. Comp. L.* 393-394 (1977).

4. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, 16 *Am. J. Comp. L.* 582-588 (1968); Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, 25 *Am. J. Comp. L.* 394-399 (1977); Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, 25 *Am. J. Comp. L.* 399-403 (1977).

5. Two Conventions of 2 October 1973 on the Law Applicable to Maintenance Obligations and on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 21 *Am. J. Comp. L.* 587-592, 156-162 (1973); Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, 13 *Am. J. Comp. L.* 615-620 (1964); Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 69 *Rev. crit.* 893-901 (1980) = 27 *Netherlands International L. Rev.* 397-401 (1980).

6. See the survey of the state of ratifications as of 1 March 1981 in 70 *Rev. crit.* 176-203 (1981).

rect influences in the systematic discussion of the European equivalents to American evolutions in conflict of laws.

Indirect Influences

a) Legislation and Case Law

Indirect impact of American conflict of laws methods is more difficult to locate. Sometimes national legislatures refer in their supporting documents for new statutes on private international law to the American evolution in conflicts law and emphasize that they want to apply different methods.[7] In European case law, allusions to American conflicts law may be found in two different situations: in the first, litigants refer to American cases or methods in order to change domestic judge-made conflicts rules.[8] The other situation seems to happen more often, but is less likely to influence domestic law: if European local conflicts rules have to pay regard to a *renvoi*, American conflicts law must be applied by the European judge in order to find out whether (i) he has to apply American local law because there is no *renvoi*; (ii) he is referred back to his own jurisdiction; or (iii) he is referred to a third legal system.[9] In these situations European courts will contribute to the development of American law rather than shaping their own conflict of laws systems according to American models.

b) Legal Writing[10]

In some European countries (e.g. Austria, Germany, Switzerland) the important contribution of legal writing to the evolution of judge-made law is evidenced by abundant citations of literature in judicial opinions. But in other European countries as well, where courts abstain from references to legal writing, the commentaries, treatises, law review articles and case notes exert considerable influence on the judiciary. This tradition could be taken to be the means

7. *Bundesgesetz über das internationale Privatrecht (IPR-Gesetz)—Schlussbericht der [Swiss] Expertenkommission zum Gesetzentwurf* 23 and 29 (1979); Kühne, *IPR-Gesetz-Entwurf* 28-29 (1980).

8. See e.g. Winckworth v. Christie, Manson & Woods Ltd., [1980] 1 All E.R. 1121, 1133-1134 (Ch. D.), where Justice Slade was referred to Beale's *Treatise on the Conflict of Laws*, but refused to alter English conflicts law with respect to title to movables.

9. See Drobnig, *American-German Private International Law* 83-84, 90-91, 95, 104-105, 114, 116, 138 (1972).

10. There are many European books and law review articles on the American conflicts revolution. See the most recent contributions, where previous studies are also mentioned; Hanotiau, *Le droit international privé américain* (1979); Kegel, "Paternal Home and Dream Home: Traditional Conflict of Laws and American Reformers," 27 *Am. J. Comp. L.* 615-633 (1979) = id, "Vaterhaus und Traumhaus—Herkömmliches internationales Privatrecht und Hauptthesen der amerikanischen Reformer," *Festschrift Günther Beitzke* 551-573 (1979).

for transplanting American conflict of laws ideas into European soil. To date however there is no "Americanization" of European private international law. My impression is that there are two main explanations. The first pertains to general methodological divergences,[11] the second reflects independent developments in Europe similar to developments in the United States. We shall turn first to the European equivalents to American solutions, mentioning, where relevant, any traceable American influences.

European Equivalents to American Law

The American revolution in conflict of laws originates from the battle against Beale's fortification of the vested rights theory in the First Restatement of the Law of Conflict of Laws (1923-1934) and from the assault on this fortress during the following decades. One of the results of this assault is the *Restatement of the Law Second, Conflict of Laws*, adopted and promulgated by the American Law Institute in 1969 and published in 1971 (hereafter: Restatement Second).

Most Significant Relationship

The Restatement Second uses as applicable law the law of the state which, with respect to a particular issue, has the most significant relationship to a certain person, thing or act (tort, contract etc.). Similarly, it requires for judicial jurisdiction a reasonable relationship between the forum state and the parties to the action or the issue in question.

It is an irony of history that by using the notion "most significant relationship" the Restatement Second starts with a guidepost erected at the dawn of modern European conflicts law.[12] Savigny set out to find the "seat" of a legal relation, i.e., the jurisdiction to which, "in its proper nature, [the legal relationship] belongs or is subject."[13] Bar advocated a functional approach guided by the *Natur der Sache* (nature of the subject).[14] Gierke sought to apply the law of that country in which the spatial "center of gravity"

11. See infra at text following n. 217.

12. Kegel, "Begriffs-und Interessenjurisprudenz im IPR," *Festschrift Hans Lewald* 259, 261 (1953); Beitzke, "Betrachtungen zur Methodik im Internationalprivatrecht," *Rechtsprobleme in Staat und Kirche—Festschrift Rudolf Smend* 1, 17-22 (1952). See Batiffol, "Les intérêts de droit international privé," *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts, Festschrift Gerhard Kegel* 11-21 (1977).

13. Savigny, 8 *System des heutigen Römischen Rechts* 28, 108 (1849) = id., *A Treatise on the Conflict of Laws* 70, 133 (2d ed. 1880; reprint 1972).

14. Bar, 1 *Theorie und Praxis des internationalen Privatrechts* 105-119 (2d ed. 1889, reprint 1966) = id., *The Theory and Practice of Private International Law* 77-87 (2d ed. 1892).

(*Schwerpunkt*) of the legal relation is located.[15] Westlake favored the law with the "closest connection" to the particular issue.[16] Thus far, the approach of the Restatement Second is in harmony with classical European private international law. What may be different is that the most significant relationship is determined in the Restatement method by weighing "specific policies of the relevant local law rules" and the "general policies relating to multistate occurrences."[17]

I hesitate to characterize this weighing of policies as a completely new feature in conflicts law without any parallel in European private international law. It must not be forgotten that the Restatement Second vacillates between black-letter rules and open-ended conflicts norms. The open-ended norms authorize judicial law-making. European codes may not give such power, but, where there is similar express or tacit authorization, European courts also weigh policies. I would not characterize the Restatement Second as the product of neo-statutists.[18] Apart from the ambiguity of this term, the several classical black-letter rules of the Restatement belie such a characterization. The relevant factors of Restatement Second § 6(2) also indicate that even the Restatement authors had serious doubts whether the interpretation of local rules would suffice for a decision between conflicting rules. In addition to these wise compromises in favor of classical approaches, it must be said that there are no clear-cut distinctions between policies of substantive law and choice-relevant factors. American courts, especially in interstate conflicts, tend to rely primarily on policies of local rules, whereas European courts traditionally wrap up their arguments in more general choice-influencing considerations. The result will often be the same: local jurisdiction and the application of local substantive law in custody cases may be justified by the special policy of local law rules, or by a general international policy, that courts at the child's residence have the paramount interest in deciding a custody case according to their *lex fori*. The general policy is often nothing more than a generalization of special policies embodied in local rules.

The venerable age of the notion "most significant relationship" does not mean that this standard is outmoded. It is still used as a guide for finding the governing law. The 1978 Austrian Statute on Private International Law expressly states in § 1(1) that "factual sit-

15. Gierke, 1 *Deutsches Privatrecht* 217 (1895).

16. Westlake, *A Treatise on Private International Law or the Conflict of Laws* (1858).

17. Restatement Second § 5.

18. Vischer, "Das neue Restatement 'Conflict of Laws'," 38 *RabelsZ* 128, 138 (1974); this characterization is attributed to Currie: Lipstein, "The General Principles of Private International Law," 135 *Recueil des Cours* 97, 154-157 (1972-I).

uations with foreign contacts shall be judged, in regard to private law, according to the legal order to which the strongest connection exists," and according to § 1(2), the special conflicts rules of the statute "shall be considered as expressions of this principle."[19] What the Austrian statute expressly provides in § 1(2) is valid for more or less all European countries, their conflicts law in general and their international family law in particular. This is made evident by subsidiary conflicts rules expressly referring to the law of countries with a stronger or the strongest connection. These subsidiary rules, however, illustrate another phenomenon which sheds some light upon differences between American and European conflicts law.

Open-Ended Conflicts Norms

Whether the court is invited to look for the "most significant relationship," the "seat" of legal relations, their "center of gravity," or similar catch-words, it must be admitted that such oracular provisions are more or less "non-rules."[20] They are not designed to answer the crucial question of conflicts law—to fix the governing law—but tend to repeat the question in different terms and empower the law courts to find the answer themselves. The Restatement Second makes use of the term "most significant relationship" in a very distinctive way. Many conflicts rules with specific connecting factors pointing in a certain direction are open-ended, in that the law primarily designated governs unless another law, with respect to the particular issue, has a more significant relationship. Several examples of this approach, with open-ended conflict norms, may be mentioned: § 283(1) on the validity of marriage, § 297(1) and § 258(1) concerning marital property in movables, and § 287(1) on the law governing legitimacy. If there is no black-letter conflicts rule, the standard of the most significant relationship must serve (see Restatement Second § 6).

Open-ended conflicts norms are characteristic features of the Restatement Second without exact equivalents in European conflicts law. Normally in Europe the legislature definitely designates the applicable law. In some instances the designated law governs the particular question exclusively. Art. 19(1) of the Italian *Disposizioni sulla legge in generale* may serve as an example: "The matrimonial property relations between spouses are governed by the husband's national law at the time of marriage." In other instances a degree of flexibility is provided by subsidiary connecting factors

19. See the translation in 28 *Am. J. Comp. L.* 222 (1980) and Palmer, "The Austrian Codification of Conflicts Law," 28 *Am. J. Comp. L.* 197, 204-205 (1980).

20. Ehrenzweig used to criticize these "non-rules" of the Restatement Second, not taking into account that the Restatement is not a code but a simple restatement which has to be flexible enough for the present and for future development.

(e.g. habitual residence or domicile of a stateless person),[21] or by providing that several designated laws apply cumulatively (e.g. the national law of the betrothed of different nationality for the validity of a marriage)[22] or alternatively (e.g. *lex causae* or law at the place of contracting for the formal validity of a marriage or any contract).[23] The preference for black-letter conflicts rules with statutorily fixed connecting factors still prevails, as is shown by a West German unofficial draft for a new statute on private international law which in family law favors a set of successively applicable laws. According to the draft of the *Deutscher Rat für Internationales Privatrecht* (German Council for Private International Law) the incidents of a valid marriage are successively determined by the law of the country

1. of which both spouses are nationals;
2. which has been the spouses' last common nationality during their marriage provided that one of them is still a national of that country;
3. in which the spouses habitually reside;
4. which has been the spouses' last common habitual residence provided that one of them still habitually resides there;
5. to which the spouses have the closest connection.[24]

Similar rules with successively applicable laws, with a so-called *Anknüpfungsleiter* or *Kaskaden-Anknüpfung* may be found in the Swiss draft,[25] in the Austrian Statute on Private International Law,[26] in other West European conflict of laws statutes[27] and also in East European conflicts law.[28] The German law courts have developed a

21. According to the United Nations Convention of 28 September 1954 on the Status of Stateless Persons.

22. See e.g. Austrian IPR-Gesetz § 17(1); West German EGBGB art. 13(1); East German Rechtsanwendungs-Gesetz § 18(1); Italian Disp. prel. art. 17(1); Swiss NAG art. 7c(1).

23. Austria IPR-Gesetz § 16(2) and § 8; West German EGBGB art. 11(1). However, there are exceptions for domestic marriages. They can only be performed according to domestic formalities: see Austrian IPR-Gesetz § 16(1); West German EGBGB art. 13(3); East German Rechtsanwendungs-Gesetz § 18(2); Swiss NAG art. 7c(2).

24. Draft Deutscher Rat: Ehewirkungen § A; similar, Draft Kühne § 14(1).

25. Swiss Draft 1978, art. 41, 46, 53, 60, 68 and 81.

26. Austrian IPR-Gesetz §§ 18, 21, 22.

27. Portuguese Civil Code art. 52, 53, 56, 57; Spanish Civil Code art. 9(2)-(5), (7); see also art. 1, Dutch Statute of 25 March 1981 on international divorce, Staatsblad van het Koninkryk der Nederlanden 1981 no. 166; Verheul, "Het wetsontwerp internationale echtscheiding," 5 *Nederlands Juristenblad* 572-573 (1980); Boele-Woelki, "Die internationale Ehescheidung in den Niederlanden," 33 *Das Standesamt* 266-270 (1980).

28. Czechoslovakian Conflicts Statute §§ 21-22; East German Rechtsanwendungs-Gesetz §§ 19-20; Hungarian Conflicts Decree art. 39-40; Polish Conflicts Statute art. 17-18.

similar approach in order to satisfy the constitutional requirement for non-discriminatory conflicts rules.[29] Dutch courts have pursued the same path in order to find a fair compromise between predictability of results and flexibility in favor of individual justice.[30]

A conflicts rule which makes different laws successively applicable can hardly be compared with open-ended conflicts rules of the Restatement Second style. Even if the last step of a European conflicts provision points to the law of the closest connection, European courts may not invoke it before finding inapplicable the rules in the earlier steps. Yet there seem to be some equivalents to the open-ended conflicts rules of the Restatement Second. The Austrian Statute on Private International Law of 1978, § 1, seems to have incorporated the same idea. According to § 1 the specific conflicts rules of the statute may be read as prima facie evidence of the strongest connection, which may be discarded if there is an even stronger connection with another law. This interpretation of § 1 is very much disputed,[31] and is denied by the author of the Austrian statute.[32] In Switzerland there are plans for clear legislative regulation. Art. 14 of the Swiss draft expressly states: "The law designated in this statute is, by way of exception, not to be applied if under all the circumstances the facts of the case bear only a slight relationship to the designated law, and clearly bear a closer relationship to another law."[33] This general "exception clause" might be interpreted as a rule transforming all specific conflicts rules of the Swiss draft into open-ended ones. Such an interpretation is expressly rejected by the final report to the draft, mentioning the different approach of the Restatement Second.[34] The exception clause of art. 14 is, roughly, a copy of art. 1(2) of the Swiss Civil Code, adapted to the specific necessities of a statute on conflicts law.[35] This means that the clause

29. As to this necessity Juenger, "The German Constitutional Court and the Conflict of Laws," 20 *Am. J. Comp. L.* 290-298 (1972). As to German decisions, see Bundesgerichtshof 29 October 1980, 36 *Juristenzeitung* 65 (1981); Kammergericht 16 April 1975, (1976) *Entscheidungen der Oberlandesgerichte in Zivilsachen* 221.

30. See Hoge Raad 10 December 1976, 1977 *Nederlandse Jurisprudentie* 929 no. 275; marital property; Hoge Raad 27 May 1977, 1977 id. 1896, no. 600: divorce. This trend is confirmed by the Dutch statute, supra n. 27.

31. See Palmer, supra n. 19 at 204-205 (1980); Schwind/Duchek, *Internationales Privatrecht* 7-10 (1979).

32. Schwind, "Prinzipien des neuen österreichischen IPR-Gesetzes," 32 *Das Standesamt* 109, 110 (1979).

33. Translation by McCaffrey, "The Swiss Draft Conflicts Law," 28 *Am. J. Comp. L.* 250 (1980).

34. *Bundesgesetz*, supra n. 7 at 29, 59-60.

35. *Bundesgesetz*, supra n. 7 at 29 and 60; see also McCaffrey, supra n. 33 at 250-252. Swiss Civil Code art. 1(2) reads: "Where no provision is applicable, the judge shall decide according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator" [Translation by Williams, 1 *The Swiss Civil Code*, book I & II, 1 (1976)].

has to be applied *modo legislatoris*, i.e. by formulating rules which may be generalized and used for future cases.[36] Thus it seems that art. 14 of the Swiss Draft will codify principles already existing in Switzerland[37] and in other European countries.[38]

One should mention the Dutch conflicts law in this connection. Dutch law courts feel free to formulate new conflicts rules if traditional principles are no longer in harmony with modern trends and international conventions.[39] Without any statutory provision, the Dutch *Hoge Raad* declined to apply the common national law of spouses to a divorce suit when the spouses had only formal contacts with their national state. It applied the law of the spouses' common habitual residence.[40]

It may be that the few European open-ended conflicts rules have been influenced by American models.[41] The difference between American and European law in the quality and quantity of such rules can be explained easily. On the one hand, the rules of the Restatement Second are not statutory rules designed by a legislature as binding provisions. The American Law Institute has formulated guides to be applied by American law courts according to their own policies. On the other hand, it is clear for Europeans that statutes should not be merely guidelines or indefinitely formulated general clauses. To have such clauses most countries do not need an act on conflict of laws. Even in The Netherlands, with a most flexible judiciary and a group of very progressive authors, the recommendations are not for timid evolution from case to case but for a self-confident reform of conflicts law *modo legislatoris* in law courts and confirmed by the legislature.[42]

Black-letter rules are more important in some parts of family

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36. *Bundesgesetz*, supra n. 7 at 29.

37. See Vischer, *Droit international privé* 11, 15, 41 and 95 (1974); id., "Der Richter als Gesetzgeber im internationalen Privatrecht," 12 *Annuaire suisse de droit international* 75, 82-83 (1955).

38. 3 Fikentscher, *Methoden des Rechts in vergleichender Darstellung* 760-763 (1976). As to the differences between judge-made law in common law and in civil law countries, see Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* 228-241 (1956).

39. Jessurun d'Oliveira, "Die Freiheit des niederländischen Richters bei der Entwicklung des internationalen Privatrechts," 39 *RabelsZ* 224-252 (1975).

40. Hoge Raad 27 May 1977, supra n. 30; Hoge Raad 9 February 1979, 1979 *Nederlandse Jurisprudentie* 1824 no. 546; Arrondissements-Rechtbank's-Hertogenbosch 7 December 1979, 1980 *Nederlandse Jurisprudentie* 1688 no 524. This judge-made modification of the principle of nationality has been codified: see Dutch statute, supra n. 27.

41. However, it must not be forgotten that, at least in the law of contracts, European conflicts law has long applied an open-ended conflicts rule when the parties have not chosen the law governing their contract.

42. Supra n. 27 and 40; de Boer, "De vermaatschappelijking von het internationaal privaatrecht," 55 *Nederlands Juristenblad* 785-796 (1980); Jessurun d'Oliveira, *De ruine van een paradigma: de konfliktregel* (1976); Strikwerda, *Semipubliekrecht in het conflictenrecht-verkenning op een kruispunt van methoden* (1978).

law than in the field of torts or contracts. In Europe it is common to register status relations in a civil register.[43] This system requires rather rigid black-letter conflicts rules, and a good deal of international uniformity is useful. Legal certainty in family matters is supposed to be more important than flexibility.[44] Whether this is really necessary is open to question. The evolution of the last twenty years shows that in former times the drive for certainty was exaggerated.

Choice-Influencing Considerations

The basic question for legislative or adjudicative events pertains to the policies to be pursued in the law-making process. In the United States these policies have been formulated by Cheatham and Reese,[45] and by Leflar,[46] and they have been incorporated in the Restatement Second.[47] Some sections of the Restatement Second on matters of family law expressly refer to § 6(2) in enumerating choice-influencing factors.[48]

In Europe there are schedules similar to those of Restatement Second § 6(2) or to Leflar's choice-influencing considerations. These factors are called "*objectifs*" (Batiffol),[49] "*Interessen*" (Kegel),[50] and "*Wertungen*" (Neuhaus).[51] The main difference between American and European conflicts law is that the European choice-influencing considerations form an analytical explanation of well-established conflicts law,[52] or to a lesser extent a guide for the national legislature. For reasons already explained, there are no statutory provi-

43. All Continental countries of Western Europe, except the Scandinavian states, are parties to the "Commission International de l'Etat Civil." See Simitis, "Die Internationale Kommission für Zivilstandswesen (C.I.E.C.)," 33 *RabelsZ* 30-72 (1969).

44. See Neuhaus, "Legal Certainty versus Equity in the Conflict of Laws," 28 *Law & Contemp. Prob.* 795-807 (1963). North, "Development of Rules of Private International Law in the Field of Family Law," 166 *Recueil de Cours* 9, 37, 41 (1980-I).

45. Cheatham & Reese, "Choice of the Applicable Law," 52 *Colum. L. Rev.* 959 (1952); Reese, "Conflict of Laws and the Restatement Second," 28 *Law & Contemp. Prob.* 679 (1963).

46. Leflar, "Choice-Influencing Considerations in Conflicts Law," 41 *N.Y.U.L. Rev.* 267-327 (1966); id., "Conflicts Law: More on Choice-Influencing Considerations," 54 *Calif. L. Rev.* 1584-1598 (1966); id., *American Conflicts Law* 193-195, 205-219 (3d ed. 1977). About Leflar's theory, see Felix, Juenger, Todd & Rosenberg in 31 *S. Carol. L. Rev.* 409-456 (1980).

47. See e.g., Restatement Second § 6(2), § 145(2), § 188(2), and other specific sections referring to the above-mentioned general sections enumerating the factors relevant for the choice of the applicable rule of law.

48. Restatement Second § 257-258 (marital property), § 283 and 284 (marriage), § 287 and 288 (legitimacy).

49. Batiffol, *Aspects philosophiques du droit international privé* 229 (1956).

50. Kegel, *Internationales Privatrecht* 54-70 (4th ed. 1977); id., "Begriffs-und Interessenjurisprudenz," supra n. 12 at 259-288.

51. Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* 41-70 (2d ed. 1976).

52. Loussouarn/Bourel, *Droit international privé* 196-200 (1978).

sions offering a group of choice-influencing considerations to the courts to be applied in individual cases, similar to § 6(2) of the Restatement Second.[53]

The American and European choice-influencing considerations are more or less the same. One of these factors, however, deserves closer examination because it is also disputed in the United States: the application of the better rule of law.

Better Rule of Law

Leflar introduced the application of the better rule of law as a choice-influencing consideration.[54] This policy has been accepted by some American courts even when the better law was foreign law.[55] Ehrenzweig also inserted the better law argument into his system and admitted that a better foreign law may displace the *lex fori*.[56] The Restatement Second did not list the better law as a factor relevant to the choice of the applicable law,[57] but it also pays regard to considerations of material justice,[58] which may lead to the same result.

The trend towards application of the better rule of law is especially strong in matters of family law. This can be shown in five different areas—the establishment of status relations, divorce, maintenance, other incidents of family relations, and the recognition of foreign judgments on questions of status.

a) Establishment of Status

The famous judgment of the German Federal Constitutional Court of 4 May 1971 removed an obstacle for foreigners marrying a divorced German national.[59] The same problem existed in Switzerland and was solved by the Swiss Federal Court in the same year.[60]

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53. Supra, text following n. 41.

54. Leflar, "Choice-Influencing Considerations," supra n. 46 at 295-304; id., *Conflicts Law*, supra n. 46 at 1578-1588; id., *American Conflicts Law* 195, 212-215 (3d ed. 1977).

55. See e.g. Frummer v. Hilton Hotels International, Inc., 304 N.Y.S.2d 335, 344 (Sup. lt. 1969); Gravina v. Brunswick Corp., 338 F. Supp. 1, 6 (D.R.J. 1972).

56. Ehrenzweig, 1 *Private International Law*, 96-98, 100-103 (2d ed. 1972); id., "Specific Principles of Private Transnational Law," 124 *Recueil des Cours* 189-190, 210-213 (1968).

57. Supra n. 47.

58. E.g. Restatement Second § 6(2)(d); protection of justified expectations; § 203: *lex validitatis* against the charge of usury.

59. Bundesverfassungsgericht 4 May 1971, 31 *Entscheidungen des Bundesverfassungsgerichts* 58 (1971); see Juenger, supra n. 29. This question will be answered expressly by a future German statute: cf. Draft Deutscher Rat: Eheschliessung I § A(2); Draft Kühne § 12(3); Draft Max-Planck-Institute Thesis 5(2).

60. Bundesgericht 3 June 1971 (Dal Bosco), 97 I *Entscheidungen des Schweizerischen Bundesgerichts* 389 (1971). This rule will be codified; see Swiss Draft 1978 art. 40(2).

Both judgments may have a touch of governmental interest approach and "contain more than just a dash of Currie."[61] Certainly they are overdue revisions of self-fabricated errors[62] and reflect a *favor matrimonii* which may be traced also in other cases. One might refer to France where foreigners may marry according to French law without regard to their national law. Although the substantive validity of marriage in France is governed by the national law of the parties,[63] the public official performing the civil marriage is not obliged to apply foreign law *ex officio*. If the parties do not give evidence as to their national law, the public official will perform the marriage ceremony according to French law and inform the spouses that their marriage may be invalid under their national law.[63a]

The most striking examples of favoring marriage are the uncomplicated recognition of a foreign marriage in Swiss law,[64] the German court practice to recognize foreign voidable marriages until they are voided,[65] and the general rule to honor the foreign *lex loci actus* even if the national law of the parties does not recognize the form at the place of marriage.[66] Besides these examples, the Swiss preliminary draft for a statute on private international law openly favors marriage.[67] Similar proposals have been made for the reform

61. See Juenger, "Trends in European Conflicts Law," 60 *Corn. L. Rev.* 969, 981 (1975). This opinion will not be shared by everyone. Kegel, a violent critic of Currie, who favored the result in the case before the German Constitutional Court (infra next note), may disagree with respect to the impact of the Constitution on conflicts law: see Kegel, "Embarras de richesse," 36 *RabelsZ* 27-34 (1972). Wengler, on the other hand, who is not very enthusiastic about Currie's approach, shares the view of the Court about the relation between the Constitution and the conflicts law: Wengler, note to Bundesgerichtshof 29 April 1964, 20 *Juristenzeitung* 100-103 (1965).

62. In Germany such a reform was proposed more than ten years ago; see Neumayer, "Ehescheidung und Wiedererlangung der Ehefähigkeit," 20 *RabelsZ* 66, 81-85 (1955); Kegel, "Reform des deutschen internationalen Eherechts," 25 *RabelsZ* 201, 203-204 (1960); id., "La réforme du droit international du mariage en Allemagne," 51 *Rev. crit.* 641, 634 (1962); Lauterbach (ed.), *Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts* 1, 12-13 (1962).

63. 2 Batiffol/Lagarde, *Droit international privé* 36-37 (6th ed. Paris 1976).

63a. See no. 475 (now no. 541) of the Instruction générale relative à l'état civil du 21 septembre 1955, 44 *Rev. crit.* 574, 596 (1955), version of 1974, see 1974 *Journal officiel de la République Française* 5286 and 8596. As to this instruction see Batiffol, 16-18 *Travaux du comité français de droit international privé* 41, 46 (1955/57), and Batiffol/Lagarde, supra n. 63.

64. Swiss NAG art. 7 f; Swiss Draft 1978 art. 43.

65. See e.g. Oberlandesgericht Frankfurt a.M. 26 May 1967, 20 *Neue Juristische Wochenschrift* 1426 (1967) = 32 *RabelsZ* 727 (1968); Luther, "Die sogenannten Tondern-Ehen," 34 *RabelsZ* 679-702 (1970).

66. These situations happen with a foreign civil marriage of a Greek couple because Greek law requires a religious marriage ceremony and classifies this prerequisite as a matter of substance and not of form: see Oberlandesgericht Frankfurt a.M. 23 November 1970, 18 *Zeitschrift für das gesamte Familienrecht* 179 (1971).

67. Swiss Draft 1978 art. 41.

of German conflicts law.[68]

The most important field of application of the better law is the law of parent and child. This is done by designating alternative factors with the proviso that a given question or issue shall be answered in the affirmative if the law of one of the designated factors gives this answer. A good example of this approach is art. 311-17 French Civil Code (enacted in 1972):

> The voluntary acknowledgement of paternity or maternity is valid if it is given in accordance with either the personal law of the acknowledging parent or the personal law of the child.

The similarity of this provision with Restatement Second § 287(2) is obvious. The Restatement Second also makes use of alternatively-designated laws. However, what seems to be an exception in American law has become very popular in European conflicts law. The French reform act on the law of filiation was the first statute with a distinctive policy in favor of the better law, in particular in favor of the child. Art. 311-16 on legitimation by subsequent marriage and judicial decision is also notable in this connection. The Austrian Statute of 1978 on Private International Law adopted similar provisions. Matters of legitimacy and of legitimation are governed by the parents' personal status law. If, however, the parents have different personal status laws (normally, different nationalities), "the one more favorable to the legitimacy of the child or to legitimation shall be determinative."[69] In some East European statutes on private international law similar provisions in *favorem pueri* can be found.[70]

European judges have also developed a better-rule approach. At least in Switzerland and West Germany the question of legitimacy is answered alternatively by the national conflicts rule on legitimacy or by the conflicts rule provided by Hague conventions for maintenance obligations.[71] The Swiss and German drafts for new statutes on private international law also reflect a certain preference for the establishment of status relations.[72]

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68. Draft Kühne § 12(2); Draft Max-Planck-Institute Theses 5-7. See generally Pålsson, "Marriage and Divorce," 3 *Int. Encyc. Comp. L.* 16-43 and 16-73 (1978).

69. Austrian IPR-Gesetz § 21 and § 22.

70. See Czechoslovakian Conflicts Statute § 23(2) and § 26(3) concerning legitimacy and adoption.

71. See Lalive/Bucher, "Sur la loi applicable a la 'question préalable' de la filiation, selon la Convention de la Haye du 24 octobre 1956," 33 *Annuaire suisse de droit international* 377-390 (1977); 2 Böhmer/Siehr, *Das gesamte Familienrecht—Das internationale Recht* 7.4, marginal notes 82-95 (1980).

72. Swiss Draft 1978 art. 71(2) concerning the acknowledgement of an illegitimate child; Draft Kühne § 12 (marriage), § 19 (legitimacy), § 23 (legitimation); Draft Max-Planck-Institute Theses 5(1), 7(1), 11-14 concerning marriage, legitimacy, legitimation and adoption. Generally on alternatively applicable laws see Beitzke, "Alternative Anknüpfungen," *Konflikt und Ordnung, Festschrift Murad Ferid* 39-60 (1978).

b) Favor divortii

The universal trend to facilitate divorce is reflected in the conflicts rules of some European countries. This *favor divortii* is exercised in different ways. The most common device to facilitate a divorce, however, is to designate the *lex fori* as the subsidiarily-applicable *lex divortii*.[73] This device may be interpreted as a special clause of public policy. A genuine better-law approach in matters of divorce is the proposal in favor of party autonomy.[74] *Favor divortii* is also expressed by the designation of alternatively or subsidiarily applicable laws without immediate recourse to the *lex fori*. This approach is pursued for certain cases by the Austrian Statute on Private International law[75] and by draft proposals for a new West German p.i.l. statute.[76] Another manifestation of the *favor divortii* is the Swiss development of case law facilitating divorce for foreigners of different nationalities living in Switzerland.[77] The French reform of international divorce law favoring the French *lex fori in foro proprio* may also facilitate a divorce, but not necessarily. Therefore this solution is dealt with under a special heading.[78]

c) Maintenance

Maintenance obligations form one of the most important incidents of a status relationship. It is not surprising therefore that even here the better-law approach may be encountered. Two different styles of this approach have to be distinguished. Some national conflicts rules designate several laws as potentially applicable, so that the plaintiff may choose the law most favorable for him.[79] The Hague Conventions of 1956 and 1973 on the Law Applicable to Maintenance Obligations are more cautious. They designate subsidiarily applicable laws only if under the primarily governing law no maintenance obligation exists.[80] According to this restricted better-law ap-

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73. Czechoslovakian Conflicts Statute § 22(2); East German Rechtsanwendungs-Gesetz § 20(2); Hungarian Conflicts Decree § 41(a). Pålsson supra n. 68 at 16-147.

74. Swiss Draft 1978 art. 60(3); the Dutch statute on international divorce, supra n. 27, indirectly favors a "choice" by one foreign party contending that he has lost any connection with his home country (supra n. 40); then the law at the couple's common habitual residence will apply, subsidiarily the Dutch *lex fori* (supra n. 27).

75. Austrian IPR-Gesetz § 20(2).

76. Draft Deutscher Rat: Ehescheidung I § B; Draft Neuhaus & Kropholler art. 17; Draft Max-Planck-Institute Thesis 10.

77. Swiss NAG art. 7 h; Bundesgericht 11 July 1978 (Cardo v. Cardo), 94 II *Entscheidungen des Schweizerischen Bundesgerichts* 65 (1978); as to this decision see Juenger, supra n. 61 at 975-976.

78. Infra at n. 156.

79. French Civil Code art. 311-18; Hungarian Conflicts Decree §§ 45 and 46.

80. Arts. 3 and 4 of the Hague Convention of 1956, arts. 5 and 6 of Hague Convention of 1973; as to the last see supra n. 5; the former is reproduced in 5 *Am. J. Comp. L.* 656-657 (1956).

proach there is no possibility to choose the law according to which the plaintiff may obtain the largest amount of money for maintenance. This can only be done—to a limited extent—by forum shopping.[81] The modest better-rule approach of the Hague Convention is proposed to become part of the new Swiss and West German codifications of conflicts law.[82]

d) Other Incidents of Status Relations

The Restatement Second mentions the parties' freedom to choose the applicable law as an example of the choice-influencing consideration, "protection of justified expectations."[83] Leflar shares this view and limits the better-law approach to a choice made by the court and not by the parties.[84] Be this as it may, in a broader sense the law expressly chosen by the parties must be considered as the best law for their relationship, because who else could better determine the law most suitable to both parties? It is for this reason that in many European countries the law governing the matrimonial property regime can be chosen by the spouses. This rule may be a statutory one, as in Austria,[85] or developed by case law as in France[86] and the Netherlands.[87] The same approach has been proposed by the Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes[88] and by national law reform committees in Switzerland and West Germany.[89]

Apart from this modern trend towards party autonomy in marital property relations, there are only scarce signs in favor of the choice of the applicable law with respect to relations between spouses[90] or to personal incidents of the relationship between parent and child.[91]

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81. See art. 2 of the Hague Convention of 1956 and art. 15 of the Hague Convention of 1973 (supra n. 80).

82. Swiss Draft 1978 arts. 47 and 82; Draft Deutscher Rat: Unterhaltsansprüche § 4; Draft Kühne § 22.

83. Restatement Second § 6 comment g on subsection (2).

84. Leflar, *American Conflicts Law* 205-206 (3d ed. 1977).

85. Austrian IPR-Gesetz § 19.

86. 2 Batiffol/Lagarde, supra n. 63 at 318-323.

87. Hoge Raad 10 December 1976, 1977 *Nederlandse Jurisprudentie* 929 no. 275 = 67 *Rev. crit.* 97 (1978) with note by Jessurun d'Oliveira = 24 *Netherlands Int. L. Rev.* 474, 479 (1977) with comment by van der Ploeg; Hoge Raad 20 April 1979, 1980 *Nederlandse Jurisprudentie* 1702 no. 527; see for this evolution Cohen Henriquez, *I.P.R. Trends* 104-107 (1980).

88. Art. 3 of the Hague Convention, supra n. 5.

89. Swiss Draft 1978 arts. 50-52; Draft Deutscher Rat: Ehewirkungen § B; Draft Kühne § 15; Draft Neuhaus & Kropholler art. 14(3); Draft Max-Planck-Institute Thesis 8(2).

90. Draft Max-Planck-Institute Theses 8(2), 9(3), 10(2).

91. Hungarian Conflicts Decree § 46.

e) Recognition of Foreign Judgments

The "limping" marriage and other limping status relations, strange offspring of private international law, are not only caused by different conflicts rules but also by the non-recognition of foreign judgments. In order to avoid limping family relations some European countries are now more liberal in recognizing foreign judgments than formerly. Examples of this trend are the English case, *Indyka v. Indyka*,[92] and the subsequent English Recognition of Divorces and Legal Separations Act of 1971,[93] in implementation of the Hague Convention of 1970 on the same subject.[94] But changes took place on the Continent as well. With respect to foreign divorces, the liberalization was achieved in three steps. Ireland is almost the only European country which does not provide for divorce.[94a] Other states have introduced divorce (Italy and Spain) and at the same time have removed obstacles to recognition of foreign divorces. In Germany reciprocity is no longer required for recognition.[95] The most important and common evolution, however, pertains to the jurisdiction of the foreign court. In extending the adjudicative jurisdiction of their own courts, the European countries have attributed the same jurisdiction to foreign courts for purposes of recognition.[96] The Swedish law is extremely liberal,[97] but not representative of Continental standards. The more moderate liberal trend is pursued by the Dutch statute, as well as German and Swiss drafts for new legislation.[98]

With respect to relations between parent and child, the Hague Conventions on the Recognition and Enforcement of Foreign Decisions Relating to Maintenance Obligations[99] and the Hague Convention of 1961 on the Protection of Minors[100] dominate, and ensure that

92. Indyka v. Indyka, [1969] 1 A.C. 33 = [1967] 2 All E.R. 689 = [1967] 3 W.L.R. 510 (H.L.).

93. 1971 *Current Law Statutes Annotated* c. 53.

94. Supra n. 4.

94a. Other countries are Andorra, Malta and San Marino.

95. This prerequisite was definitely removed in 1962, see Staudinger (-Gamillscheg), *Kommentar zum BGB*, IPR, vol. 2, § 328 ZPO marginal notes 393-399, p. 1078-1079 (10th & 11th ed. 1973).

96. Basedow, *Die Anerkennung von Auslandsscheidungen* 133-137 (1980).

97. Law of 1904 (version of 1973) on certain international relations with respect to marriage and guardianship, chapter 3 § 7, in: Pålsson, *Författningssamling i internationell privaträtt* 15, 18 (2d ed. 1980).

98. As to the Dutch law see Verheul, supra n. 27 at 572-574, and Bode-Woelki, supra n. 27 at 269-276; Draft Kühne § 32 no. 1; Draft Neuhaus & Kropholler § 328 ZPO; Draft Max-Planck-Institute Thesis 23; Swiss Draft 1978 art. 65.

99. Supra n. 5 and the Hague Convention of 1958 on the same subject, but restricted to maintenance obligations towards minors; see the text in 5 *Am. J. Comp. L.* 658-661 (1956).

100. See 9 *Am. J. Comp. L.* 708-711 (1960) with report by Nadelmann, id. 583, 585-586.

in Western Europe the most important decisions on behalf of a child will be recognized and enforced. The Hague Convention against child kidnapping is designed to fill a gap.[101] Moreover the Brussels Convention of 1968 on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is expressly applicable to maintenance decisions.[102]

f) Intermediate Summary

There is a type of better-law approach in European private international law insofar as certain results favored by domestic law are also aimed at in conflicts law. This is done by using traditional methods within a still classical system of conflicts law, i.e. by designation of several laws alternatively applicable, by favoring the *lex fori,* choice of law or choice of the forum by the parties or one party only, and by a liberal attitude towards the recognition and enforcement of foreign judgments. No direct influence of American law has fostered this evolution, which in fact began before the eruption of the American revolution.[102a]

Governmental Interests and False Conflicts

The application of the better rule of law might be thought to be a policy of the forum state and therefore an example of the governmental-interest approach initiated and developed by Brainerd Currie and followed by others. This conclusion would be wrong. Currie rejects choice-of-law rules of the traditional type and concentrates on the policies expressed in the substantive laws of the states having some contact with the individual case.[103] Therefore he inserted the "false conflicts" notion into his system, because in such cases no conflict arises or a conflict can be avoided by a moderate and restrained interpretation of the policy or interest of one state.[104]

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101. Supra n. 5.

102. Brussels Convention art. 5(2); the new version of the Convention of 1968 (version of 9 October 1978) is published in 21 *Official Journal of the European Communities* No. L 304/77-102 (1978).

102a. In favor of a more ambitious selection of the better law see Zweigert, "Zur Armut des internationalen Privatrechts an sozialen Werten," 37 *RabelsZ* 435-452 (1973)=id., "Some Reflections on the Sociological Dimensions of Private International Law, or: What is Justice in Conflict of Laws?," 44 *U. Colo. L. Rev.* 283 (1973); Juenger, *Zum Wandel des Internationalen Privatrechts* 21-34 (1974), with a vigorous statement of Kegel in the appendix (at 35-44); critical about this trend Lipstein, "Private International Law with a Social Content—A Super Law?," *Festschrift Konrad Zweigert* 178, 192-197 (1981).

103. The last summary of his theory prepared by himself in 1964 may be found in Reese & Rosenberg, *Cases and Materials on Conflict of Laws* 469-476 (7th ed. 1978).

104. The term "false conflict" shall be used here as the identity of results. As to the ambiguity of the term see Westen, "False Conflicts," 55 *Calif. L. Rev.* 74-122 (1967).

In European international family law there are only a few traces which may be attributed to a governmental-interest approach. The closest similarity in this respect is the false-conflicts problem, a problem well known for centuries.[105] Even under a system of conflicts rules of the traditional type no judge will spend much time searching for the proper conflicts rule if all the laws potentially applicable lead to the same result. This practice has been followed by courts of many European countries without any attempt to institutionalize it.[106]

After World War II in West Germany the false-conflicts practice began to flourish in matters of family law through a lack of constitutionally unobjectionable conflicts rules.[107] For instance in a decision of the Hamburg District Court, an Iranian wife brought a divorce suit against her Indonesian husband.[108] According to art. 17(1) of the German Introductory Law to the Civil Code the husband's national law is designated as the law governing a divorce suit. The District Court did not decide whether this conflicts rule is unconstitutional and, if affirmatively answered, which conflicts rule would meet the constitutional requirements of equal treatment of husband and wife. The judges avoided these questions because according to the national laws of both spouses and according to the law of the forum the wife's claim was well founded and the marriage had to be dissolved. Apart from this European "false-conflicts attitude," there are only a few cases which might be interpreted as genuine examples of a governmental-interest approach. The best example originates in tensions between East and West Germany. According to East German court practice, persons forfeited their support claims against East German debtors if they (the creditors) had fled from East to West Germany and instituted support claims in East Germany.[109] The reasons given by East German courts were polit-

105. Cf. 1 Lainé, *Introduction au droit international privé* 93-267 (1888); Karl Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus* (1901 and 1916), with respect to medieval Italy where only the *divergent* tribal customs and local statutes raised the conflicts question.

106. German Reichsgericht 25 April 1932, 86 *Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten* 271 (1932); and other German decisions infra n. 108; Dutch Hoge Raad 19 January 1968, 18 *Nederlands Tijdskrift voor Internationaal Recht* 351 (1971); see Jessurun d'Oliveira, *De antikiesregel—Een paar aspekten van de behandeling van buitenlands recht in het burgerlijk proces* (1971); Lipstein, supra n. 102a, 190.

107. Since West German written conflicts rules on matters of family law make the husband's or the father's personal status law the law governing, these rules were held to be unconstitutional under the basic right of equal treatment of men and women (art. 3 § 2 Basic Law). See Federal Constitutional Court 4 May 1971, supra n. 59, and Juenger, supra n. 29.

108. Landgericht Hamburg 24 May 1977, *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts* (hereafter: *IPRspr.*) im Jahre 1977 no. 68.

109. See the leading case of the Supreme Court of the G.D.R. 21 August 1958, 12

ical ones and have been expressly articulated. Because the flight was illegal under East German law and the fugitives by their flight acted traitorously against East Germany, and thereby strengthened the hostile regime of West Germany, support payments to creditors in West Germany would amount to an indirect assistance to the enemy. This episode of the cold war came to an end in 1972 with the East German Nationality Act legalizing the status of former refugees.[110]

In other instances with a slight touch of governmental-interest analysis the European courts made use of their traditional methods. They either created new conflicts rules as exceptions to a formerly comprehensive general rule[111] or they applied the tool of public policy to avoid clashes between the *lex fori* and the designated foreign law. Thus foreign prohibitions against marriage to one with a different religion[112] or rigid foreign provisions on custody without regard to the welfare of the child were eliminated.[113] Yet here too it has to be admitted that using the emergency brake of *ordre public* differs from a genuine governmental-interest approach in several respects. The application of the public policy tool presupposes conflicts rules of the traditional type; this tool is applied with great reluctance or, as the Hague conventions put it, "only if it [the foreign law governing] is manifestly incompatible with public policy." Finally it is questionable whether recourse to public policy can be said to be inspired by the "governmental" interest of the forum.[114]

Some European authors sympathize with Brainerd Currie's theory,[115] but only in the field of international economic relations such as competition and antitrust law. For other subjects, Currie's ideas have never been tried seriously and have been opposed vigorously.[116] The reason for such opposition seems quite obvious: most

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Neue Justiz 683 (1958) = 1958/59 *Sammlung der deutschen Entscheidungen zum interzonalen Privatrecht* [hereafter: *IzRspr.*] 72 no. 34 (1962).

110. See e.g. Stadt-Gericht Gross-Berlin 4 March 1974, 47 *Der Amtsvormund* 287 (1974).

111. Obergericht Zürich 4 September 1969, 65 *Schweizerische Juristen-Zeitung* 374 (1969), with respect to the legitimacy of a child.

112. Oberlandesgericht Hamm 3 September 1976, *IPRspr.* 1976 no. 33.

113. Austrian Oberster Gerichtshof 7 November 1974, 53 *Österreichische Richterzeitung* 40 (1975).

114. "Governmental" interests prevail e.g. in § 18(1) of the East German Act Determining the Applicable Law according to which an East German woman can marry a foreigner only with governmental permission.

115. Joerges, *Zum Funktionswandel des Kollisionsrechts* 151-169 (1971); id., "Die klassische Konzeption des Internationalen Privatrechts und das Recht des unlauteren Wettbewerbs," 36 *RabelsZ* 421-491 (1972).

116. See Kegel, "The Crisis in Conflict of Laws," 112 *Recueil des Cours* 91, 97-207 (1964 II); id., supra n. 10. See also Jayme, "Zur Krise des 'Governmental-Interest Approach'," *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts, Festschrift Gerhard Kegel* 359-366 (1977).

Continental countries have statutory conflicts rules of the traditional type, to a large extent unified by international conventions; there is very little room left for governmental-interest analysis. In family law such analysis would meet serious objection because the European system of personal status registers is incompatible with *ad hoc* evaluation of conflicting interests. Firm black-letter conflicts rules have to designate not only the law governing marriage but also the law applicable to legitimacy, legitimation and adoption. So long as these black-letter conflicts rules are held to determine the personal and territorial spheres of application of national laws, there will be no real chance for a governmental-interest approach in European international family law.[116a]

The same is true of Quadri's approach, which, with respect to the application of foreign law,[117] has some similarity with Currie's theory and with the functional approach of von Mehren and Trautman.[118]

European Interest Analysis and American Functional Approach

European interest analysis as developed and articulated especially by Gerhard Kegel[119] must be distinguished from the functional approach advocated by von Mehren and Trautman. European interest analysis concentrates mainly on the generalized interest of all jurisdictions in a fair solution of cases with contacts to more than one state. In family law one of the main interests has been to guarantee international harmony in order to avoid limping status relations. This and other interests have more similarity to Leflar's choice-influencing considerations[120] and the factors which the Restatement Second enumerates as relevant to the choice of the applicable rule of law than to interest analysis as such.[121] The functional approach of von Mehren and Trautman is more complex. The authors first locate the jurisdictions which have a concern with the particular issues that have arisen in a case. Then they construct for each such jurisdiction a rule regulating the issues in their multistate aspects.[122] In Continental Europe these regulating rules are for the

116a. See Rehbinder, "Zur Politisierung des Internationalen Privatrechts," 28 *Juristenzeitung* 151-158 (1973), as to the same conclusion in general, but advocating experiments in single fields of economic relations. Skeptical, North, supra n. 44 at 36, 50-88.

117. See De Nova, "New Trends in Italian Private International Law," 28 *Law & Contemp. Prob.* 808, 814, 817-821 (1963) = id., *Scritti di diritto internazionale privato* 39, 48-49, 53-59 (1977).

118. Infra at n. 122.

119. Kegel, supra n. 12 at 259-288; id., *Internationales Privatrecht* 54-67 (4th ed. 1977).

120. Supra n. 46.

121. Restatement Second § 6(2).

122. Von Mehren & Trautman, *The Law of Multistate Problems* 76-77 (1965).

most part conflicts rules of the traditional type. Hence there would be no problem to apply the approach of von Mehren and Trautman in Europe. Whether the authors would still call such European handling of their theory a "functional" approach seems to be rather doubtful.[123] Yet there are no indications that the European countries will stop favoring black-letter conflicts rules and instead compare the functions of concurring rules of different states with respect to substance and personal, territorial and temporal application.[124] Apart from uneasiness with "approaches" rather than rules,[125] this attitude may be explained by several distinctive features of the European conflicts scene. International conflicts cases are likely to arise more often on the Continent because in many countries the national law of the parties is expressly concerned with issues of family law. Therefore every case of a foreigner, even if domiciled in the forum state, is a conflicts case. A second peculiarity of European law is that the differences in substance and, lest we forget, in language between the various national expressions of the so-called civil law are larger and more complicated than those between different common law jurisdictions. Finally it has to be remembered that in many European countries the governing law must be ascertained and applied *ex officio*.[126]

Special Substantive Rules for Multistate Problems

In various fields of commercial law there is a growing number of special substantive rules for multistate problems. The law of sales (Hague Conventions, UNCITRAL Convention) and of transport (e.g. Warsaw Convention) may be mentioned as examples. In family law matters such special substantive rules for multistate problems are far less developed.[127] Substantive rules in European conflicts law

123. See Schnitzer, "Die funktionelle Anknüpfung im internationalen Vertragsrecht," *Festgabe Wilhelm Schönenberger* 387-404 (1968), and the same author's codification of this functional approach in classical conflicts rules: 76 *Schweizerische Juristen-Zeitung* 309-316 (1980).

124. In favor of a new beginning Gutzwiller, "Von Ziel und Methoden des IPR," 25 *Annuaire suisse de droit international* 161-196 (1968).

125. It is unclear how the authors find the "concerned" jurisdictions. A mere hunch will not satisfy European standards.

126. This is especially true of Austria (IPR-Gesetz § 4), West Germany (Code of Civil Procedure § 293), Italy and the East European countries: see Zajtay, "The Application of Foreign Law," 3 *International Encyclopedia of Comparative Law*, ch. 14, p. 9-12. See recently Belgian Court of Cassation 9 October 1980, 96 *Journal des tribunaux* 70 (1981); Swiss Draft 1978 art. 15. See also Flessner, "Fakultatives Kollisionsrecht," 34 *RabelsZ* 547-584 (1970). This proposal has been met with favor by some authors, but has not yet materialized in practice.

127. See von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology," 88 *Harv. L. Rev.* 347-371 (1974), being the General Report on the same subject for the IXth Congress of the International Academy of Comperative Law (Teheran 1974).

are either rules of universal application[128] or special expressions of the public policy of the forum state.[129] Special substantive rules in family law emerge out of two typical situations: clashes between several jurisdictions should be avoided or rules of several jurisdictions should be coordinated. In the first case account will be taken of another jurisdiction if otherwise "serious disadvantages for the person may arise."[130] In the other situation several jurisdictions are designated by the normal conflicts rules, for instance with respect to the illegitimate child and paternal authority. The contradiction of these rules may be solved directly by choosing the best solution for the child or, less forcefully, by preference for the law of the parent with whom the child actually resides.[131]

Lex fori in foro proprio

Since the earliest days of American conflict law many questions of domestic relations (e.g. divorce, adoption, custody) have been answered by the rules on jurisdiction: if a court has jurisdiction, it may apply the *lex fori*.[132] This principle of the *lex fori in foro proprio* was advocated as of general application by Ehrenzweig.[133] Whether this is true for American law will not be discussed here; we will concentrate on the European parallels to this principle.

a) Traditional European Equivalents

There are well-settled examples of the principle of *lex fori in foro proprio* in Swiss law. A foreigner domiciled in Switzerland can secure a divorce under Swiss law if the Swiss divorce decree will be recognized in his country of origin. This rule has been in effect since 1876,[134] and was slightly modified in 1912.[135] The gist of the rule is that it provides a forum and—since 1912—expressly states

128. See e.g. Swiss Draft 1978 art. 32(1): "Everybody is capable of having rights;" European Court of Human Rights 13 June 1978, Marckx case, 19 *Int. Leg. Mat.* 109 (1980): legal relations between a mother and her illegitimate child are established by the child's birth (not through acknowledgement by the mother); it is the unwritten rule that with custody cases the best interests of the child are paramount.

129. East German Rechtsanwendungs-Gesetz § 18(1): requiring permission for marrying a foreigner.

130. Swiss NAG art. 8c concerning the additional application of the child's national law to his adoption in Switzerland.

131. See 2 Böhmer/Siehr, supra n. 71, part. 1, p. 32 (at 1.6.2.1).

132. See e.g. the jurisdiction and governing law in cases of divorce and custody.

133. Ehrenzweig, supra n. 56 at 103-110 and 214-218; id. with a short statement in: Reese & Rosenberg, supra n. 103 at 472-473.

134. Art. 56 of the Federal Statute of 24 Dec. 1874 on the Determination and Certification of the Status and on Marriage (Bundesgesetz betreffend Feststellung und Beurkundung des Zivilstandes und die Ehe).

135. Swiss NAG art. 7g, as inserted into the NAG by art. 59 of the Introductory Provisions to the Swiss Civil Code of 10 December 1907, in force since 1 January 1912.

that Swiss substantive law applies.[136] This *lex fori* approach has been pursued by the Swiss judiciary in other cases[137] and later was adopted by the Swiss legislature.[138] In France foreigners may marry according to French law.[139] However, this rule does not reflect a *lex fori* approach. It is rather the result of procedural provisions on the certification of foreign law.[140]

b) Recent European Developments

Before the United States became a member, the Hague Conference of Private International Law started to pursue the *lex fori* approach in several conventions, especially on the law of minors. The first convention of this type is the Hague Convention of 5 October 1961 on the Protection of Minors,[141] in force in seven West European countries.[142] This convention emphasizes unified regulation of jurisdiction and provides that the court having jurisdiction must apply its own *lex fori* (arts. 1 and 2, art. 4). The same policy is followed by the Hague Convention of 15 November 1965 on the Adoption of Minors,[143] in force in three states,[144] and by the Convention of 14 March 1978 on the Law Governing Marriage, not yet ratified by any state.[145]

This policy of the Hague Conference cannot be attributed to American influences. With respect to the two early conventions, specific problems of the protection of minors convinced the Hague Conference to unify the provisions on jurisdiction and recognition of foreign decisions. The main objective of this preference has been to facilitate the decision-making process by application of the *lex fori*. This is necessary especially in the field of parent and child because courts must decide quickly and on firm bases in order to promote the best interests of the child.[146] This may be called a sort of "enlightened territorialism," as put forward by Twerski.[147]

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136. Swiss NAG art. 7g (2).
137. Infra n. 157.
138. Infra at n. 152.
139. Batiffol/Lagarde, supra n. 63.
140. Supra n. 63a.
141. Convention of 5 October 1961 on the Jurisdiction and the Law Applicable in the Field of the Protection of Minors, supra n. 100.
142. Austria, France, Germany (Federal Republic), Luxembourg, Netherlands, Portugal, Switzerland. Italy's parliament has approved it, *Gaz. Uff.* no. 310, 12 Nov. 1980 (Supp.).
143. Supra n. 5.
144. Austria, Great Britain, Switzerland.
145. Supra n. 4.
146. See report of von Steiger in 4 Conférence de La Haye de Droit International Privé, *Actes et Documents de la neuvième session* 225-226 (1961).
147. Twerski, "Enlightened Territorialism and Professor Cavers—The Pennsylvania Method," 9 *Duquesne L. Rev.* 373 (1971); id., "Neumeier v. Kuehner: Where are the Emperor's Clothes?," 1 *Hofstra L. Rev.* 104, 120-124 (1973).

Not only international conventions designate the *lex fori in foro proprio* as governing law. The same has been done by domestic statutes on private international law, by court practice and by drafts of conflict of laws conventions or statutes. This evolution was fostered to a large extent by the Hague Conventions. The Hague Convention of 1961 on the Protection of Minors was extended beyond its personal scope of application by Dutch courts,[148] has influenced the (abandoned) Benelux Uniform Draft Convention on Private International law[149] and is embodied in the Swiss Draft Conflicts Law[150] which applies the same principles for the protection of adults.[151] The same phenomenon can be observed with respect to the Hague Convention on Adoption. In 1972 the Swiss legislature intentionally modeled the new conflicts provisions on adoption according to the Hague Convention[152] and will maintain this solution in the future.[153] The Swedish parliament did the same.[154] Some Dutch courts are inclined to apply the principles of the Hague Convention, even though it has not yet entered into force in the Netherlands.[155]

Although the Hague Conference has been of considerable influence on the domestic conflicts law of some countries, there are also autonomous tendencies towards the *lex fori in foro proprio*. The French divorce-law reform of 1975 introduced art. 310 of the Civil Code, favoring the application of French law by French courts.[156] Swiss courts applied Swiss law to an illegitimate child's action of support against his father, if under (former) art. 312 Swiss C.C. the

148. Arrondissements-Rechtbank Amsterdam 12 June 1973, 1973 *Nederlandse Jurisprudentie* 958 no. 341; Arrondissements-Rechtbank Haarlem 25 July 1979, 1980, id. 1684 no. 522; see Kokkini-Tatridou, "Overzicht der Nederlandse Rechtspraak," 109 *Weekblad voor Privaatrecht, Notariaat en Registratie* 6-12, 24-25 (1978).

149. As to the final version of the Benelux Treaty of 3 July 1969 see Nadelmann, "The Benelux Uniform Law on Private International Law," *18 Am. J. Comp. L.* 406-425 (1970). See art. 6 and 7 of the Treaty and the official comment on these provisions in *Tractatenblad van het Koninkrijk der Nederlanden*, 1970 no. 16 at 20-22. As to the abandonment of the Draft Convention, see 23 *Netherlands International Law Review* 248-255 (1976).

150. Swiss Draft 1978 art. 84.

151. Swiss Draft 1978 art. 85.

152. Swiss NAG art. 8a and 8b, inserted into the NAG by the Federal Statute of 30 June 1972 Concerning Adoption.

153. Swiss Draft 1978 arts. 74-76.

154. Statute 1971: 796 on international legal relations concerning adoption, see Pålsson, supra n. 97 at 37. Karlgren, *Internationell privat-och processrätt* 36-37, 133 (5th ed. 1974).

155. See Hoge Raad 11 April 1980, 1980 *Nederlandse Jurisprudentie* 1197 no. 364. Arrondissements-Rechtbank 's-Gravenhage 23 November 1966, 1970 *Nederlandse Jurisprudentie* 719 no. 259. On the application of conventions in the Netherlands prior to their entry into effect, see Jessurun d'Oliveira, supra n. 39, 243-245.

156. See Glendon, "The French Divorce Reform of 1976," 24 *Am. J. Comp. L.* 199-228 (1976); Carbonneau, "The New Article 310 of the French Civil Code for International Divorce Actions," 26 *Am. J. Comp. L.* 446, 452-460 (1978).

Swiss court had jurisdiction.[157] Today in most cases the same result will be achieved because the child may sue his father at the child's domicile (new art. 279(2), Swiss C.C.) and the law applicable is, according to the Hague Convention of 1973,[158] the law at the creditor's habitual residence. However, the present solution is not based on the *lex fori* approach.

In the East European countries several provisions apply local law to all foreigners[159] or to a *mariage mixte*.[160] Strong examples of the application of the *lex fori in foro proprio* are scarce in Eastern Europe.[161]

c) Intermediate Summary

European international family law is not based upon the principle of the *lex fori in foro proprio*. Yet there is a certain trend first to fix the place of jurisdiction and then to empower the competent court to apply its own substantive law. This trend is pursued and fostered by several Hague conventions. In Swiss conflicts law the same attitude has a longer tradition. Whereas the Anglo-American *lex fori* approach in matters of status rests on jurisdictional bases, and Ehrenzweig advocated the substantive rule of the forum as "residuary rule,"[162] the European trend is consciously chosen because of two policies: 1) the courts at the habitual residence of the person primarily concerned should have jurisdiction; 2) to facilitate and speed a decision, the court should apply the substantive law of the forum.

Jurisdiction-and Rule-Selecting Approach

Nearly 50 years ago David F. Cavers criticized the choice of law process as based on an incorrect, jurisdiction-selecting approach.[163]

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157. Swiss Federal Court of 7 November 1958, 84 II *Entscheidungen des Schweizerischen Bundesgerichts* 602, 605-614 (1958).

158. Supra n. 5.

159. See Soviet Union: Bases for the Legislation of the Union of the SSR and the Union Republics on Marriage and Family (version of 9 October 1979) art. 31 (marriage), art. 33 (divorce), art. 34 (affiliation), art. 35 (adoption), art. 36 (guardianship): German translation in: 33 *Das Standesamt* 203-205 (1980).

160. Czechoslovakian Conflicts Statute § 21 (relations between husband and wife), § 22 (divorce); East German Rechtsanwendungs-Gesetz § 19 (relations between husband and wife), § 20 (divorce), § 23 (adoption by a couple with different nationalities); Hungarian Conflicts Decree § 39(3): relations between husband and wife, § 40(3): divorce; Polish Conflicts Statute art. 17 § 3 (relations between husband and wife without common domicile), art. 18 (divorce).

161. East German Rechtsanwendungs-Gesetz § 7 (adjudication of incompetency and declaration of death).

162. Ehrenzweig, "Specific Principles," supra n. 56 at 214-218.

163. Cavers, "A Critique of the Choice of Law Problem," 47 *Harv. L. Rev.* 173 (1933), reprinted in Culp (ed.), *Selected Readings on Conflict of Laws* 101 (1956).

Instead of looking for a governing jurisdiction he focused on the single rule resolving the pertinent issue. The principles of preference which Cavers elaborated later[164] are consistent with his earlier ideas. The jurisdiction-selecting approach is a characteristic feature of European conflicts law, but even in the United States jurisdiction-selection is still widely preached and the rule-selecting approach is far from being generally accepted in theory and practice.[165]

Dépeçage is a common phenomenon in choice of law and focuses on single issues.[166] If a comparison is made with respect to *dépeçage*, there do not seem to be fundamental differences between American and European conflicts law. In European conflicts law there are several special conflicts rules for general issues such as capacity, form of contracts or prescription. The justification for these is twofold. The policy of these rules may be valid for many similar questions (e.g. *favor validitatis* with respect to the form of marriage, marriage contracts or acknowledgement of illegitimate children),[167] or it is considered necessary to answer the same general issue, wherever it arises, in the same way (e.g. personal capacity).[168] Whether these explanations are correct may be questioned,[169] but more interesting are the reasons for the limited European use of rule-selection. European law is for the most part codified law and the European codes are not a bundle of rules without systematic interrelation. They may not all be as refined and abstract as the West German Civil Code, but they all have a system and spirit of their own. This means it is dangerous to extract single rules and apply them without paying attention to their function and policy within the code's system. This danger is increased by different languages, legal notions and institutions. Therefore a European judge, once referred to foreign law by a comprehensive jurisdiction-selecting conflicts rule, prefers to deal with the case in the way his foreign colleague would, and takes care not to get lost in a hotch-potch of single rules of substantive law, designated by several rule-selecting conflicts rules, which may not fit with each other.

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164. Cavers, *The Choice-of-Law Process* (1965).

165. See e.g. the Restatement Second which, to a large extent, makes use of traditional conflicts rules selecting a jurisdiction with its substantive law and not single rules.

166. See Reese, "Dépeçage: A Common Phenomenon in Choice of Law," 73 *Colum. L. Rev.* 48-75 (1973).

167. See e.g. Austrian IPR-Gesetz § 8; West German EGBGB arts. 11 and 13(3); Italian Disp. prel. art. 26; Portuguese Civil Code arts. 36 and 50; Spanish Civil Code art. 11.

168. See e.g. Austrian IPR-Gesetz § 12; West German EGBGB art. 7; Italian Disp. prel. art. 17; Portuguese Civil Code arts. 28-29; Swiss NAG arts. 7-7b.

169. This has to some extent been questioned with respect to "special capacities" as, e.g., the capacity to marry and the capacity to acknowledge an illegitimate child. See 2 Vitta, *Diritto internazionale privato* 34-39 (1973).

The situation is different in the United States. There conflicts law is dominated by interstate conflicts cases, i.e. a situation where courts have a common legal basis even if particular rules differ. In post-war Germany the rule-selecting approach dominated in conflicts cases between West and East Germany until the BGB was abolished in East Germany and replaced by the East German Civil Code of 1975. Only differing rules were taken into consideration and their policy determined in order to discover their field of application.[170] As the legal systems of both parts of Germany became more and more different and finally were embodied in two different Civil Codes, the rule-selecting approach no longer worked. The same phenomenon can be observed in ancient times at the very beginning of our profession. The theory of the statutists was a rule-selecting approach.[171] It worked because only some rules, some statutes of the medieval Italian cities differed from each other and from the subsidiarily applicable common law (*ius commune*). When this common law began to vanish and the local differences in law became predominant, the rule-selecting approach disappeared.[172] It can be concluded that a rule-selecting approach flourishes in countries which are mainly concerned with conflicts between jurisdictions with a common legal background.

"Gimmicks" of the General Part of Private International Law

The traditional conflicts notions of general application, e.g., characterization, *renvoi*, preliminary question or public policy, have often been described as conceptual niceties or mere gimmicks in order to achieve a desired result.[173] This cannot be denied altogether. It would however be a mistake to think that these "gimmicks" are used arbitrarily by European courts. These devices must be and usually are applied consciously and with care. The conflicts decision of the German Federal Constitutional Court of 4 May 1971[174] was necessary because the lower courts did *not* change their attitude towards the preliminary question and the *ordre public*.

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170. See e.g. Oberlandesgericht Halle 23 August 1950, 4 *Neue Justiz* 502 (1950) = 1945-1953 *IzRspr.* 81 no. 38; Landgericht Braunschweig 9 October 1952, 1945-1953 *IzRspr.* 85 no. 41; Landgericht Münster 13 April 1953, 1945-1953 *IzRspr.* 94 no. 46; Landgericht Koblenz 2 August 1955, 1954-1957 *IzRspr.* 78 no. 33.

171. Cf. Karl Neumeyer, supra n. 105, passim; Yntema, "The Historic Bases of Private International Law," 2 *Am. J. Comp. L.* 297-317 (1953), reprinted in Culp, supra n. 163 at 30-46.

172. As to the situation at the times of Mancini, Savigny, and Story, see Jayme, *Pasquale Stanislav Mancini* (1980); Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* (1923); Kegel, "Joseph Story," 43 *RabelsZ* 609-631 (1979).

173. 1 Ehrenzweig, *Private International Law* 111 (2d printing 1972); Leflar, *American Conflicts Law* 176-180 (3d ed. 1977).

174. Supra n. 59.

a) Characterization

There are only two European statutory provisions on characterization which can be compared with § 7 of the Restatement Second. The Spanish Civil Code (art. 12 no. 1) and the recently enacted Hungarian Statutory Decree on Private International Law codify the competence of the *lex fori*, and according to the Hungarian Decree the characterization *lege fori* has to be done with a side-glance to the foreign *lex causae* for primary characterization.[175] This does not mean that in other jurisdictions the problem of characterization does not exist. Since this problem was "discovered" independently by the French and German scholars Etienne Bartin and Franz Kahn at the end of the last century it has been a general problem of interpretation for which no statutory provision is needed. Especially in domestic relations some intricate questions of characterization arise. Are problems to be characterized as matrimonial property, as personal effects of marriage,[176] effects of divorce[177] or of succession?[178] These problems may be avoided by applying the same law to the different issues involved, and such attempts have been and will be made by new codifications.[179] Even questions of parent and child are to be determined by the law governing the relation between husband and wife.[180]

b) Preliminary Question

While the notion of characterization is universal, the so-called preliminary question seems to be a rare flower cultivated and in blossom especially in Germany. The most important preliminary questions in family law pertain to the validity of marriage with respect to the status of children: are children legitimate even if the marriage of their parents is invalid according to the law of the forum or according to the law governing the relation between parent and child? Is the status relation between an illegitimate child and his father established for purposes of support even if the father's personal law does not recognize such a status relationship? All of these questions arise in all jurisdictions. Often the question is not put because

175. Hungarian Statutory Decree § 3; as to other codes see Neuhaus in Makarov, *Quellen des Internationalen Privatrechts* 8 (3d ed. 1978).

176. 1 Rabel, *The Conflict of Laws* 342-348 (2d ed. 1958) with respect to the wife's agency power.

177. With respect to the German *Versorgungsausgleich* see Bundesgerichtshof 7 November 1979, 75 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 241 (1980).

178. As to this see 1 Rabel, supra n. 176, 408-410.

179. Austrian IPR-Gesetz § 19 for the matrimonial property regime not chosen by the parties; see also Draft Kühne § 30; Draft Neuhaus & Kropholler art. 24(1); Draft Max-Planck-Institute Thesis 16(1).

180. See Draft Deutscher Rat: Eheliche Kindschaft § A(1); Legitimation I. § A; Annahme als Kind I. § A(1); Draft Kühne § 20(1), § 23, § 25(1).

the problem is not known. The hidden question may be answered (unconsciously) differently in similar situations and become a gimmick. In the United States the preliminary-question problem is partially solved by notions such as *dépeçage*, "datum" or the rule-selecting approach.

c) Renvoi

Like characterization, *renvoi* is an institution of ancient dignity. International family law is one of its most important fields of application, if it is used at all. This reservation must be entered because there is no common European attitude towards *renvoi*. The scale ranges from a statutory exclusion of any *renvoi* (Greece, Italy)[181] to a pragmatic admission in special types of cases (Switzerland),[182] under certain conditions (Portugal)[183] or according to judicial discretion (Czechoslovakia),[184] to a general recognition of a *renvoi* to the *lex fori* (Austria, Germany, Hungary, Poland, Spain).[185] The main effect of accepting a *renvoi* is that nationals of Anglo-American countries with their domicile or immovable property in the forum state are not subject to their national law but to the *lex fori* if their national law determines family relations according to the *lex domicilii* or the *lex rei sitae*. In this way the *renvoi* serves to promote international harmony between countries which determine the personal status law of a person differently by choosing different connecting factors (nationality versus domicile or residence).

d) Public Policy

The barrier of public policy is a universal device to suppress the application of an offensive foreign law and to use the *lex fori* as a substitute.[186] Family law is one of the fields in which the first choice of law needs to be corrected most frequently, because the principle of nationality followed in several European countries may call for the importation of foreign family law with unbearable policies.[187]

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181. Greek Civil Code art. 32; Italian Disp. prel. art. 30.

182. Vischer, *Droit international privé* 18-22 (1974).

183. Portuguese Civil Code arts. 18 and 19.

184. Czechoslovakian Conflicts Statute § 35.

185. Austrian IPR-Gesetz § 5; West German EGBGB art. 27; East German Rechtsanwendungs-Gesetz § 3; Hungarian Conflicts Decree § 4; Polish Conflicts Statute art. 4; Spanish Civil Code art. 12 no. 2.

186. Sometimes it is advocated not to apply the *lex fori* but the expurgated *lex causae* or special substantive rules: see Kegel, *Internationales Privatrecht* 243 (4th ed. 1977).

187. See Lagarde, *Recherches sur l'ordre public en droit international privé* 136-143 (1959); Mercier, *Conflits de civilisations et droit international privé—Polygamie et répudiation* 91-116 (1972); Wuppermann, *Die deutsche Rechtsprechung zum Vorbehalt des ordre public im Internationalen Privatrecht seit 1945 vornehmlich auf dem Gebiet des Familienrechts* 75-294 (1977).

e) Lois d'application immédiate

Apart from public policy another device for the application of the *lex fori* has emerged: the *lois d'application immédiate*,[188] the *norme di applicazione necessaria*,[189] or the *selbstgerechte Sachnormen*.[190] All these terms refer to domestic law of the forum which is said to apply "immediately," i.e. without any conflicts rule, although important contacts to foreign jurisdictions exist. This new discovery seems to be related to Currie's and Ehrenzweig's spatial interpretation of rules of substantive law. Francescakis, however, refers to Nussbaum's "spatially conditioned internal rules"[191] and correctly points out that his discovery is not so much a new contribution but rather a revival of ancient ideas. So-called "statutes of a strictly positive and absolute [i.e. mandatory] nature" were known as early as Savigny (*Gesetz von streng positiver, zwingender Natur*).[192] In this there is no obvious influence of American conflicts law on European private international law.

f) Intermediate Summary

There is no doubt that general structural problems of private international law are more important in Europe than in the United States. There are several explanations for this. Although Europeans may be inclined to conceptualize problems more than necessary, the systematization of Continental law and its discursive method of law finding urge a more complicated structure of conflicts rules and of the conflict of laws altogether. The striving for certainty has tended in the same direction. Finally the European discussion of common problems at the Hague Conference of Private International Law and in other bodies would have been fruitless without a common vocabulary of general conflicts problems which arise everywhere in conflicts law.

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188. Francescakis, *La théorie du renvoi* 13 (1958); id., "Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles de conflicts de lois," 55 *Rev. crit.* 1-18 (1966).

189. De Nova, *Scritti di diritto internazionale privato* 353-425 (1977); 1 Vitta, supra n. 169 at 166-169 (1972). See also Morris, "Statutes in the Conflict of Laws," *Multum non multa, Festschrift Kurt Lipstein* 187, 198-200 (1980).

190. Kegel, "Die selbstgerechte Sachnorm," *Gedächtnisschrift Albert A. Ehrenzweig* 51-87 (1976); Schwander, *Lois d'application immédiate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht* 248-315 (1975).

191. Francescakis, *La théorie*, supra n. 188, 15; Nussbaum, *Principles of Private International Law* 69-73 (1943); id., *Grundzüge des internationalen Privatrechts* 69-71 (1952); id., *Deutsches internationales Privatrecht* 3-5 (1932), where Nussbaum speaks of "räumlich [or "örtlich"] bedingte Sachnormen."

192. 8 *System*, supra n. 13 at 33-37 = *Treatise*, supra n. 13 at 76-79.

Evaluation and Summary

Influences of American Conflicts Law

After the Second World War American law had considerable influence in some foreign countries on some fields of law which were highly developed in the United States and therefore could be used as a model in other jurisdictions. Suffice it to mention here the influence of American corporate law in postwar Japan[193] and on the West German Antitrust Statute.[194] American conflicts theories have not exerted similar attractive power. There are many European studies on the American conflicts revolution, but I know of no leading European conflicts treatise which takes any American approach and advocates it as a substitute for the traditional European conflicts method. Some American concepts, such as "false conflict" or "datum," have been received in Europe,[195] and sometimes American experiences and theories are used in the evolution of European conflicts law without giving up the European method entirely.[196] What are the reasons for this reluctance? Why do the modern American theories fail to have the same appeal and influence which in the last century Story exerted on Savigny?[197] Some of the reasons for the modern European "isolationism" have already been mentioned. Here they will be summarized, without criticism of American theories or evaluation of their effectiveness in the United States.

Differences

There is no European conflicts law proper. Yet there are an increasing number of sources common to many European countries. In family law the Hague Conventions dominate to a large extent.[198] The European Community's jurisdiction in matters of family law is narrowly restricted.[199] In Scandinavia most subjects of international

193. See Noda, "Japan," in: 1 *International Encyclopedia of Comparative Law* J-12 (1971), Blakemore & Yazawa, "Japanese Commercial Code Revisions Concerning Corporations," 2 *Am. J. Comp. L.* 12-24 (1953).

194. See comment by Fikentscher, 2 *Am. J. Comp. L.* 523-533 (1953).

195. See e.g. Neuhaus, supra n. 51, 335: Jayme, "Ausländische Rechtsregeln und Tatbestand inländischer Sachnormen—Betrachtungen zu Ehrenzweigs Datum-Theorie," *Gedächtnisschrift Albert A. Ehrenzweig* 35, 45-49 (1976).

196. Jayme, supra n. 195; Siehr, "Ehrenzweigs *lex-fori*-Theorie und ihre Bedeutung für das amerikanische und deutsche Kollisionsrecht," 34 *RabelsZ* 585, 624-631 (1970); id., "Die rechtliche Stellung von Kindern aus hinkenden Ehen—Zur alternativeen Anknüpfung der Vorfrage in favorem legitimitatis," 24 *Das Standesamt* 205-213 (1971); id., "Heilung durch Statutenwechsel," *Gedächtnisschrift Albert A. Ehrenzweig* 129-182 (1976).

197. Gutzwiller, supra n. 172, 110-115.

198. Supra n. 4 and 5.

199. See supra n. 102.

family law are harmonized.[200] The East European countries are bound by bilateral treaties which are generally based on common principles.[201] But even without common sources there are some distinctive features of European conflicts law which explain the slight echo of American revolutionary sounds in Europe.

a) Codified European Conflicts Law

In most European countries international family law is codified by national statutes or international treaties.[202] Where there are or were no such provisions, statutory rules have been introduced or are in preparation.[203] Outmoded statutes will be replaced by modern ones.[204] These written black-letter rules attempt to designate the jurisdiction with the most significant relationship to specific types of cases, taking all choice-influencing considerations and interests into account. The impact of these codifications is considerable. They stabilize or petrify the law of conflict of laws. Revolutionary ideas which do not match the codified system will remain interesting theories without practical results. This fate will meet not only American scholars but also their European colleagues.[205]

Another effect of a codified conflicts law is that the normal conflicts rule must be a black-letter rule. There is no need for codification if the rules are open-ended. But this does not mean that the legislator has to dispense with flexibility altogether. Exception clauses,[206] subsidiary and alternative connecting factors[207] and so-called "gimmicks" are designed to do justice in individual cases.

b) Diversity of European Substantive Law

Although there is a certain harmonization of the family law of European countries, pronounced differences between national provisions still remain. Not only do individual rules differ, so do the systematic bases. Hence the rule-selecting approach which prevailed in medieval times and in post-war Germany between East and West Germany[208] would be difficult to put into practice in Europe today.

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200. See Essén/Pålsson, *Konventionssamling i internationell privaträtt* 25-69 (2d ed. 1980).
201. Szaszy, *Conflict of Laws in the Western, Socialist and Developing Countries* 59-64 (1974).
202. No comprehensive codification exists in the Benelux-states, Great Britain and the Scandinavian countries.
203. See e.g. the Austrian IPR-Gesetz and the revised civil codes of Portugal and Spain. In Bulgaria and Yugoslavia statutes are in preparation.
204. This will be done in West Germany and in Switzerland.
205. See for the purely theoretical impact of Quadri's ideas: De Nova, supra n. 117.
206. Supra at n. 33-38.
207. Supra at 47 ff. and n. 74-77.
208. Supra n. 170 and 171.

The jurisdiction-selecting approach has been codified by international treaties and national statutes. On the Continent substantive law is codified in civil codes. It is the common feature of European civil codes that they strive to codify rules of "universal" character, i.e. rules thought to be just and appropriate for everyone, rather than pursuing protective and territorial or personally restricted policies. Therefore in most European countries it is impossible to interpret substantive law in order to discover its personal and territorial field of application.[209] There are only a few substantive provisions which might be in themselves limited to purely internal relations or to local citizens. Normally the territorial or personal limitations of substantive law are governed by the codified conflicts rules. This general description must be qualified, however. The more the civil codes are supplemented by regulatory legislation (*Eingriffsgesetze*) the more the "neutral" character of the civil codes will vanish and the spatial interpretation of substantive law will increase. It is a common experience that it is primarily in the interpretation of regulatory legislation that the law's spatial and personal reach is manifested.[210]

c) Conflicts Paradise: Europe

Normally Europeans look at American law as the abundant legal laboratory, but not in international family law. The reason for this is simple: because in most European countries the nationality of a person is still an important connecting factor, every family law case concerning an alien is a conflicts case, i.e. a case with contacts to more than one legal system. This is different in countries dominated by the principle of domicile or residence. There the foreign nationality of a person normally does not constitute a contact to foreign law and therefore does not raise the conflicts question. To be specific, millions of foreigners, forming about 6 or 7% of the whole population, reside in France and West Germany. All matters touching the personal status of these persons are potential conflicts cases. This abundance of conflicts cases is reflected in voluminous collections of court decisions on conflicts law in which the chapter on family law is the most extensive.[211]

The widespread legal rule requiring courts and other authorities to apply conflicts law and foreign law *ex officio*[212] also contributes to

209. An interest analysis would be fictional and metaphysical. See Brilmayer, "Interest Analysis and the Myth of Legislative Intent," 78 *Mich. L. Rev.* 392-431 (1980), as to the American situation.

210. Supra at 66 concerning the lois d'application immédiate.

211. See *Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts* (annual publication of German case law on conflicts law).

212. Supra n. 126.

the conflicts paradise. It is this European scenery that explains the necessity for codification and international treaties, and the futility of deciding every case after expensive and burdensome methods of functional analysis, weighing of interests or contacts.[213] Moreover, conflicts cases must also be handled by inferior courts, i.e. the theory must be as simple as possible—at least for jurisdictions where conflicts rules and foreign law are to be applied *ex officio*.

It may be true that in American conflicts cases the method of comparative law in general is more extensively employed than in European courts.[214] In the field of family law however this is not true. Comparison begins with translations of foreign statutory materials and culminates in exhaustive research on foreign court practice and legal literature. There is ample evidence of these efforts.[215] Courts will be relieved of this burden the more the *lex fori in foro proprio* is applied. Furthermore, the trend in favor of the habitual residence of a person as the principal or at least subsidiary connecting factor in family law[216] will have the same effect.

d) Differences in Method

Apart from the fact that codified conflicts rules are incompatible with Ehrenzweig's or Currie's law-finding process,[217] some European methodological characteristics deserve attention in conflicts law. Whereas the common lawyer tends to argue from case to case, the civil lawyer primarily deduces his conclusions from statutory provisions and their underlying principles. He has to start with a

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213. As to a similar American view, see Leflar, "Choice of Law: A Well-Watered Plateau," 41 *Law & Contemp. Prob.* 10, 26 (1977).

214. As to this statement see von Mehren, "Choice-of-Law Theories and the Comparative-Law Problem," 23 *Am. J. Comp. L.* 751-758 (1975); id., "L'apport du droit comparé à la théorie et à la pratique du droit international privé," 29 *Revue international de droit comparé* 493-500 (1977); and for a critical approach to the feasibility of this functional analysis, Reese, "American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases," 33 *Vand. L. Rev.* 717, 728 (1980).

215. See *Gutachten zum internationalen und ausländischen Privatrecht* (annual collection of German memoranda on conflicts law and foreign law); see also the Swiss memoranda furnished by the Ministry of Justice and published in *Verwaltungspraxis der Bundesbehörden*.

216. Bucher, "Staatsangehörigkeit-und Wohnsitzprinzip—Eine rechtsvergleichende Übersicht," 28 *Annuaire suisse de droit international* 76-160 (1972); Kropholler, "Vom Staatsangehörigkeits-zum Aufenthaltsprinzip," 27 *Juristenzeitung* 16-17 (1972).

217. According to Ehrenzweig so-called "true rules" dispense with any other search for other rules, whether to create new rules or to apply subsidiarily the *lex fori*. Currie pleaded for federal legislation: "Married Women's Contracts: A Study in Conflict-of-Laws Method," 25 *U. Chi. L. Rev.* 227, 265-268 (1958) = id., *Selected Essays on the Conflict of Laws* 77, 123-127 (1963).

more or less refined discursive method,[218] and only at a later stage arrives at the point where he has to compare and distinguish cases. Here too he must act *modo legislatoris*, i.e. he has to discover and formulate the general principle governing his decision.[219] This restricted law-finding process also applies in conflicts law. New specific rules departing from or particularizing the more general principles will emerge. There is no prima facie presumption in favor of internal substantive law. What Swiss Civil Code art. 1(2) provides generally is also valid for conflicts law.[220] Even the "gimmicks" of the general part of conflicts law must be applied consciously and with the "legislative imperative" in mind.

Changed Climate in Conflicts Law

Although few direct influences of modern American conflicts law on European private international law can be seen, there seems to be no question that the American conflicts revolution has a profound impact on the climate in which European conflicts law flourishes. In family law the American conflicts atmosphere can be felt, at least with respect to three European trends: flexibility through differentiating various sets of facts; infusion of material justice by a restrained better-law approach; and preference of the *lex fori* if the forum has close contacts to the case at hand.

In my view, European scholars have not made sufficient use of the penetrating studies, the indefatigable efforts and scholarly experiments of the New World in order to improve the European conflicts law within its own peculiar system, taking account of the special European situation.[221] Thus one arrives at the strange situation that theory, for a long time supposed to be a distinctive feature of continental legal science, has become, at least for conflicts law, an American prerogative. Instead of distinguishing between typical American problems of the modern American theories and general problems also arising in Europe, the discussion of American and European conflicts scholars has been led, on the European side, to a large extent, apologetically.[222] If it merely changed that situation, our conference could be a landmark.

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218. This sort of deductive reasoning is demonstrated in the *Gutachten zum internationalen und ausländischen Privatrecht*, supra n. 215.

219. Supra n. 36.

220. Supra n. 35.

221. As to a similar conclusion, Joerges, Book Review, 178 *Archiv für die civilistische Praxis* 572, 578 (1978); Audit, "A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles," 27 *Am. J. Comp. L.* 589-603 (1979); Juenger, "Möglichkeiten einer Neuorientierung des internationalen Privatrechts," 26 *Neue Juristische Wochenschrift* 1521-1526 (1973).

222. See e.g. Kegel, supra n. 10, 102a and 116; Lorenz, *Zur Struktur des internationalen Privatrechts* 69-108 (1977).

BERNARD HANOTIAU

The American Conflicts Revolution and European Tort Choice-of-Law Thinking

When the first Restatement of the Law of Conflict of Laws was published in 1934, the conflict rule which was applied by all courts in the United States was the law of the place of the wrong.[1] It had not always been so. The rule of *lex fori* had been applied for decades by the courts; in 1875, a court from Wisconsin applied *lex fori* to a tort conflict situation and mentioned that the rule was "almost too familiar . . . for discussion or authority."[2] *Lex loci* was applied by the courts starting in 1880.[3] In 1934 it acquired status as a black-letter rule in the first Restatement.

Lex loci received a new theoretical dimension in the 1934 Restatement, which was based on the vested rights theory. According to this theory, every State had the obligation to recognize and enforce rights which had been legally vested in accordance with a foreign law. Therefore, in each case, the court had to apply the internal law of the State in which the last event necessary to give rise to an obligation took place. In the tort area, this was the State where the last event necessary to make an actor liable for an alleged tort took place.[4] Since a tort is the product of an act and an injury, and the latter is dependent on the act, the place of the wrong was said to be the place where the harm affected the body, that is, the State where the injury was suffered. Only this State had jurisdiction to determine whether the act complained of gave rise to an obligation and, in the affirmative, what the extent of this obligation was.[5]

The main qualities of the *lex loci* rule were said to be the following: it was easy to apply and led to certainty and uniformity. It also had the advantage of predictibility and facilitated the task of lawyers who had to advise their clients.[6] Indeed, the advantages are still invoked today in some European countries to justify the continued application of the rule. In the United States however, dissatis-

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1. Beale, 2 *Treatise* 1286 (1935).
2. Anderson v. Milwaukee & St. P. Ry. Co., 37 Wis. 321, 322 (1875).
3. Dennick v. Central Railroad Co., 103 U.S. 11, 18 (1880) (*dictum*).
4. *Restatement* § 377.
5. *Restatement* § 384.
6. See reference in Hanotiau, *Le droit international privé américain* 171 n. 22 (1979) (hereafter, *dip américain*).

faction with the rule appeared very early. This is easy to explain. The existence of fifty States has given rise to many more conflict situations than in any European country. Courts and scholars therefore discovered very early that the rule could lead to unjust results in complex situations.

One leading example is the decision of the Supreme Court of Alabama in *Alabama Great Southern R.R. v. Carroll*.[7] In this case, plaintiff was domiciled in Alabama. He was an employee of defendant, a railroad company incorporated in that State. At the time of the casualty complained of, plaintiff was in the service of defendant as brakeman on a freight train running from Birmingham, Alabama to Meridian, Mississippi. The contract between the parties had been made in Alabama. Plaintiff was injured by the breaking of a link between two cars in Mississippi. The evidence tended to show that the link which broke was defective and that it was in a defective condition when the train left Birmingham, due to a negligent omission on the part of some employees of defendant. Alabama had an employer's liability statute making the railroad liable for injuries caused to its employees, but Mississippi retained the common law "fellow servant rule" that insulated the railroad from such liability. The Court applied the law of Mississippi, *lex loci*, and the action was dismissed. If the negligence had occurred in Mississippi and the harm in Alabama, plaintiff could have recovered.

Application of the *lex loci* rule also led to difficulties in the case of non-physical torts where it was often difficult to determine where the place of injury was located.

Criticism of the *lex loci* rule started around 1920, when Cook and Lorenzen published articles in which they advocated abandonment of the traditional rule in favor of a more flexible approach. In the tort area, both authors proposed to apply the law that was more favorable to the plaintiff.[8] Such an approach, in which compensation of plaintiff becomes the main objective, is characteristic of the more recent case law.[9]

Another scholar had an important influence on the evolution of the law of conflict relating to torts: J.H.C. Morris. Morris wrote an article in 1951 entitled "The Proper Law of a Tort"[10] in which he suggested the courts should apply "the law which on policy grounds,

7. 97 Ala. 126, 11 So. 803 (1892).

8. Cook, *The Logical and Legal Bases of the Conflict of Laws* 345 (1942) and Lorenzen, *Selected Articles on the Conflict of Laws* 370 (1947).

9. This is the opinion of Reese, "General Course on Private International Law," II *Rec. des Cours* 61 (1976); Hancock, "Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Tort Cases," 26 *Int. & Comp. L.Q.*, 824 (1973). In the recent case law, see for instance Rosenthal v. Warren, 475 F.2d 438 (1973); Chila v. Owens, 348 F. Supp. 1207, 1211 (1973); Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973).

10. 64 *Harv. L. Rev.* 883 (1951).

seems to have the most significant connection with the chain of acts and consequences in the particular situation." Morris considered that this could be achieved by application of a conflict rule which should be "broad and flexible enough to take care of exceptional situations as well as the more normal ones."

Dissatisfaction with the *lex loci* rule has also appeared in the case law of various States. Since the courts were forced to apply the law of the place of the wrong even if its application led to unjust results, they discovered several devices to avoid application of the rule. These devices consisted of giving the problem in dispute a different classification or of invoking the public policy argument.[11] One classical example is *Grant v. McAuliffe*, which concerned a collision in Arizona of two automobiles driven by California citizens. One driver died and subsequently plaintiffs, occupants of the other automobile, brought an action in California against his estate. By California law, such an action survived the death of the tortfeasor. Arizona law provided a different solution. The court applied the law of California instead of the law of Arizona, *lex loci*. It characterized the issue in dispute as procedural and therefore governed by the *lex fori*. To have a glimpse of the more cogent reasons for the decision, one must read the last sentence, in which Judge Traynor reaches the following conclusion:[12]

> Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When as in the present case, all of the parties were residents of this state and the estate of the deceased tortfeasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.[13]

Indeed, in an article he wrote a few years later, Judge Traynor proclaimed that he was satisfied with the result of the decision but not with the reasoning. This time, he justified his opinion in the following terms:[14]

> California policy views damages for personal injuries as compensatory and the survival statute implements that policy by subordinating the interests of the decedent's heirs, legatees, devisees and creditors to the interests of the injured person. California contacts were more than sufficient to give the state an interest in applying its policy . . . Even though Arizona had a policy giving preference over injured

11. See Hanotiau, *dip américain* 177.
12. 41 Cal. 2d 859, 264 P.2d 944 (1953).
13. 41 Cal. 2d 859, 867, 264 P.2d 944, 949 (1953).
14. Traynor, "Is This Conflict Really Necessary?," 37 *Tex. L. Rev.* 670 (1959).

> claimants to heirs, legatees, devisees and creditors of the estate, there was no indication that it had any contact with the case other than the fortuitous occurrence of the accident in Arizona, hardly sufficient to give it an interest in the application of its policy.

Reference to the procedural classification was therefore a simple device to avoid application of the *lex loci* and to give a standard justification for a decision reached on the basis of interest-analysis. This evolution climaxed in 1963 in the abandonment of the law of the place of the wrong in *Babcock v. Jackson*.[15]

A Survey of the Theories

Admonitory Torts and Compensatory Torts: Albert Ehrenzweig

The law of torts is the area in which Ehrenzweig's influence has been most important. He bases his theory on a distinction between admonitory torts and compensatory torts. In his own words,

> It is essential to distinguish between those tort liabilities for moral fault which continue primarily to serve a wrongdoer's admonition, and the much more important liabilities for what I have called "negligence without fault", i.e., liabilities which, though still phrased in terms of fault, primarily serve to distribute the losses inevitably caused by the accidents of modern entreprise."[16]

To distinguish between those two categories is not always easy. For reasons of facility, Ehrenzweig identified torts that were intentional with the category of admonitory torts. On the other hand, he considered that the category of compensatory torts coincided with the law of accident liability.

The distinction drawn by Ehrenzweig has an impact on choice of law. The law applicable to admonitory torts will be in most cases the *lex fori*, since these torts have to some extent a criminal character. Courts will apply the law of the place where defendant acted only in cases where the actor can prove that he had relied on the law of this place and had reason to do so.

As far as accident liability is concerned Ehrenzweig considered that parties should be compensated by the distribution of unavoidable loss based on a system of no-fault insurance. Meanwhile, the *lex fori* would continue to be applied except in those cases where its application could not be anticipated. Indeed, in those instances, de-

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15. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). The decision has been commented on by several scholars in 63 *Colum. L. Rev.* 1212 (1963). See also *dip américain* 181.

16. *A Treatise on the Conflict of Laws* 548 (1962).

fendant could not and did not take into consideration the *lex fori* when he purchased insurance. On the other hand, the insurance company did not and could not take this law into consideration in the calculation of the premium. This is what Ehrenzweig has called "the principles of previsibility and calculability." According to these principles, when application of the *lex fori* could not be anticipated, the court should apply the law which defendant had reason to believe would be applicable. This law will vary with the issue in dispute. If it concerns the amount of damages to be awarded to the victim of an automobile accident, the court will apply the law of the place where the car was garaged.[17] The issue of spousal immunity should be governed by the law of the couple's domicile.[18]

It is important to note that Ehrenzweig's theories have had a considerable influence among the conflict writers and on the case law. Numerous decisions have invoked Ehrenzweig's principles of previsibility or calculability to decide that the law of state X either was applicable or could not be applied, because its application either was anticipated or could not be anticipated by defendant and its insurer. If application of the law of state X was anticipated, it is said that defendant relied on that law to take insurance and the insurer relied on it to calculate the premium.

Numerous decisions have based their choice of law totally or in part on such reasoning. The landmark case is *Babcock v. Jackson*, where after deciding that the law of New York should govern, the court pointed out ". . . such a result, we note, accords 'with the interests of the host in procuring liability insurance adequate under the applicable law, and the interests of his insurer in reasonable calculability of the premium'. "[19]

The inaccuracy of such reasoning has been demonstrated by several writers.[20] Their analyses have proved that the risk represented by an insured is evaluated on the sole basis of past experience. Moreover when an insurance contract is entered into, neither the insured nor the insurer takes into consideration—or even has the possibility of taking into consideration—the law that would be applicable in case an accident occurs. This has been pointed out in subsequent decisions like *Miller v. Miller*,[21] but several courts continue to apply Ehrenzweig's theories[22] although their inaccuracy

17. *Treatise* 580.

18. Id. at 583.

19. 12 N.Y.2d 473, 483-84, 240 N.Y.S.2d 743, 751, 191 N.E.2d 279, 285 (1963) [quoting Ehrenzweig].

20. Morris, "Enterprise Liability and the Actuarial Process—The Insignificance of Foresight," 70 *Yale L.J.* 554 (1961); Currie, "Review of Ehrenzweig, Conflict of Laws," 1964 *Duke L.J.* 433-434 and Hancock, supra n. 9 at 804.

21. 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968).

22. Conklin v. Horner, 38 Wis. 2d 468, 478, 157 N.W.2d 579, 584 (1968), De Foor v.

was recognized by the author himself.[23]

The conclusion that may be drawn from the foregoing analysis is that a method of solving conflict problems based on conjectures or computations is dangerous to the extent that these conjectures or computations subsequently prove to be untrue.

"Governmental Interest Analysis": Brainerd Currie

Currie's governmental interest analysis has had a considerable impact on choice of law in the United States, especially in the tort area. Currie's theory has the peculiarity that it is applicable to all conflict problems.

Governmental interest analysis has been summarized in the following terms by Currie himself:[24]

> 1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.
>
> 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.
>
> 3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.
>
> 4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.
>
> 5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise

Lematta, 249 Or. 116, 121, 437 P.2d 107, 108 (1968), Prior v. Swarner, 445 F.2d 1272 (2d Cir. 1971), Sutton v. Langley, 220 So. 2d 321 (La. C.A. 1976).

23. Ehrenzweig, "Conflict, Crisis and Confusion in Pennsylvania," 9 *Duquesne L. Rev.* 464 (1971).

24. For instance in Griswold, Cheatham, Reese & Rosenberg, *Cases on Conflict of Laws* (5th ed. 1964); see Reese & Rosenberg, *Cases on Conflict of Laws* 470 (7th ed. 1978).

of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its power under the full faith and credit clause, the determination of which interest shall be required to yield.

Currie's method has been applied by the courts in a majority of cases.[25] This statement however deserves some clarification. In most cases, Currie's method has not been applied as it has just been stated above, but has often been modified by the courts. On the other hand, it has often happened that courts have applied a mixture of several theories to a case.[26] Concerning the *Babcock* decision, Currie himself declared: ". . . but of course, there is more than governmental interest analysis in the decision. Indeed, the majority opinion contains items of comfort for almost every critic of the traditional system."[27]

Indeed, it must be pointed out that most theories include some kind of governmental interest analysis. The methods proposed by Leflar, Cavers and Reese all include an analysis of the policies which underlie the rules to be applied. An analysis of the case law reveals on the other hand that this element is the one that is decisive in most cases. This factor explains that beyond the variety of theories, there is a wide uniformity in the methods used by the courts for solving conflicts problems.

It should finally be mentioned that governmental interest analysis has been applied not only to interstate conflicts but also to international conflicts[28] and not only in cases of automobile accidents but also to products liability[29] and workmen's compensation cases.[30]

It is noteworthy that when courts apply Currie's theory to inter-

25. See references in *dip américain* 192 n. 126.

26. See references in id. at 193 n. 127.

27. "Comments on Babcock v. Jackson," 63 *Colum. L. Rev.* 1234 (1963).

28. See for instance, Neal v. Butler Aviation Intern., Inc., 422 F. Supp. 850 (E.D.N.Y. 1976); Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L., 422 F. Supp., 405 (N.D. Ill. 1976); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Hurtado v. Superior Court, 11 C.3d 574, 114 Cal. Rptr. 106, 522 P.2d 666 (1974).

29. For an analysis of several of those cases, interstate and international, see Hanotiau, "Tendances récentes de la jurisprudence récente de droit international: Con-

national conflicts, the analysis of the policies underlying the applicable rules is not conducted in the same manner as for interstate conflicts. The analysis is restricted to the presumed general purpose of the type of regulation involved, coupled with mere counting of contacts.

Principles of Preference: David Cavers

Cavers' principles of preference are based on a philosophy which has not always been correctly understood. Cavers' and Currie's starting points are identical. Courts should first eliminate false conflicts—which in fact appear to be a substantial majority in the case law. When faced with a true conflict, the court should, according to Cavers, apply the common law method that is used in all fields of law and consequently decide the case on its merits, taking into consideration the objectives and policies which govern the law of conflicts. After a certain time, when courts have rendered a sufficient number of decisions on a specific issue, they will be in a position to evolve principles of preference whose function will be to help judges in the treatment of subsequent cases.

Principles of preference should not be jurisdiction-selecting rules. On the contrary, choice of law should be based on an analysis of the rules whose application is requested. Principles of preference should, on the other hand, "leave ample room for independent judgment to any courts that resorted to them,"[31] the final objective being that they "yield just solutions to choice-of-law questions, solutions which are just not only because they provide a fair accomodation of conflicting state policies but also because they afford fair treatment to the individuals who are caught in the conflict between state policies."[32]

Cavers has formulated five principles of preference in the field of torts. He has insisted that these five principles are illustrative and do not constitute an exclusive system.[33] They are just examples of what the courts should do. These five principles are formulated as follows:[34]

1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against

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trats et responsabilité du fait des produits," *Droit et pratique du commerce international* (1981).

30. Ackerman v. Southern Wood Piedmont Co., 409 F. Supp. 469 (E.D.N.Y. 1976) and Travelers Insurance Company v. Workmen's Comp. App. Bd., 68 Cal. 2d 7, 64 Cal. Rptr. 440, 434 P.2d 992 (1967).

31. Cavers, *The Choice-of-Law Process* 136 (1965).

32. Id. at 80.

33. Id. at 136.

34. Id. at 139, 146, 159, 166, 177.

injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship.

2. Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.

3. Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.

4. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which is higher than the like standard imposed by the state of injury, the law of the former state should determine the standard of conduct or of financial protection applicable to the case for the benefit of the party protected by that state's law.

5. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was lower than the standards imposed by the state of injury, the law of the former state should determine the standard of conduct or financial protection applicable to the case for the benefit of the party whose liability that state's law would deny or limit.

Cavers' principles of preference have been applied in a few decisions.[35] They do not represent the main trend in the case law.

35. Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970) and Colley v. Harvey Ce-

Choice-Influencing Considerations: Robert Leflar

Leflar's methodology is very close to free law. He enumerates five "considerations," that is, five objectives on the sole basis of which courts should be able to solve all conflict problems. These objectives are the following:[36]

1. Predictability of results;
2. Maintenance of interstate and international order;
3. Simplification of the judicial task;
4. Advancement of the forum's governmental interests;
5. Application of the better rule of law.

Leflar's methodology has so far met with considerable success and has been applied in numerous tort cases.[37] An analysis of these cases demonstrates that a large majority have been decided solely on the basis of considerations 4 and 5. When they have been decided mainly on the basis of consideration 4, there is not much difference between these decisions and those that apply Currie's governmental interest analysis. Leflar's main originality is the "better rule of law" consideration, which has often been used by the courts to avoid application of a guest statute or a rule providing for the incapacity of married women. In a substantial number of cases, courts have considered that the better law was their own. Leflar's choice-influencing considerations lead necessarily to application of forum law.

Leflar's success in the courts may be explained variously: the choice-influencing considerations are easy to apply and represent a sort of restatement of the objectives underlying the law of conflicts, as they have been developed by the writers and the courts. Finally, they give the courts an opportunity to give an apparently rational basis to a decision that in fact is based on an informed feeling of justice or equity.

The Most Significant Relationship: Willis Reese and the Second Restatement

The Second Restatement approach to choice of law is very different from the methodologies proposed by Leflar and Currie. Unlike the latter, the Second Restatement offers various rules and principles to be applied to specific issues. Rules are proposed where, in consideration of the existing case law, the Reporter considered the issue to be ripe for restatement in the form of a black-

dars Marina, 422 F. Supp. 953 (D.N.J. 1976) (principle no. 2); Garthers v. Myers, 404 F.2d 216 (D.C. Cir. 1968) (principle no. 3).

36. Leflar, *American Conflicts Law* 205 (3 ed. 1977).

37. See references in *dip américain* at 143 n. 1.

letter rule.[38] When it was not, the Reporter proposed a principle which gives the courts wide discretion. Such a principle should be applied until the number of decisions on the issue is sufficient to evolve a more specific rule.

Wrongs are dealt with in chapter 7 of the Restatement Second. It is divided into three parts: torts (topic 1), actions for death (topic 2) and workmen's compensation. The first part, devoted to torts, is itself divided into three titles: the first one sets forth the general principle to be applied in all cases where a more specific principle or rule is not appropriate. Titles 2 and 3 include principles and rules relating to particular torts and important issues.

The general principle is included in § 145 and provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The Restatement approach is issue-oriented. The principles of § 6 which will help the court determine which state has the most significant relationship with respect to the particular issue are in fact the objectives of the law of conflicts which had been enunciated in 1952 by Cheetham and Reese in a celebrated article.[39] This article became subsequently the inspiration for Leflar's choice-influencing considerations.[40] These objectives are:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to

38. Reese, "Choice of Law: Rules or Approach," 57 *Corn. L. Rev.* 315, 322-23; General Course, supra n. 9 at 51.

39. "Choice of the Applicable Law," 52 *Colum L. Rev.* 959 (1952).

40. *American Conflicts Law* 203.

the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

It has been said that §§ 145 and 6 had an ecumenical character and made possible every result without leading to any of them. It should however be noted that in addition to the general principle of § 145, the Restatement Second sets forth other rules and principles for particular torts and particular issues. For instance, it provides that in an action for a personal injury (§ 146) as well as in an action for an injury to land or other tangible things, the law of the state where the injury occurred shall govern unless § 145 leads to a different result. In a general way, the law of the place of injury is often said to govern the particular problems and issues dealt with in titles 2 and 3. One writer has commented on this: "it does not achieve as great a departure from Restatement I as several of the courts do. It attempts, perhaps, an impossible degree of reconciliation."[41]

The Restatement rules are often referred to by the courts.[42] It is not always clear however to what extent courts that invoke § 145 correctly apply it. In some cases, the court merely determines which state has the more important contacts. In other instances, the approach followed by the court is in no way different from Currie's governmental interest analysis.

The American Theories in Europe

American theories of choice of law have had an incontestable influence on the development of private international law in Europe. Before going into details about the forms of this influence, a parallel will be drawn between the new American approach and theories developed earlier this century by European scholars.

41. Leflar, "The Tort Provisions of the Restatement (Second)," 72 *Colum. L. Rev.* 273 (1972).

42. Court citations to the Restatement Second are collected in 4 *Restatement of the Law, Second, Conflict of Laws*.

European Antecedents

The governmental interest analysis approach is reminiscent of theories developed in Europe by Quadri and Pilenko.[43] The latter developed a method which he summarized as follows:

1. In the first place the court should determine if the forum rule is applicable.

2. If it is not, it should then decide the case according to the foreign rule which declares itself applicable.

3. If several foreign rules declare themselves applicable, the court should decide the case according to the law of the state whose criteria of applicability are more similar to those of the forum.

4. If no state declares its law applicable, the court should apply the law of the forum.

A similar method was proposed by Quadri. However, in the case of a positive conflict, he would apply the law of the state of the most significant relationship. The negative conflict is dealt with on an *ad hoc* basis.

These methods, especially Pilenko's approach, offer important similarities to Currie's governmental interest analysis, with the difference that Currie abandons choice of law rules. It is by way of construction that he determines the scope of the domestic rules whose application is requested by the parties. Pilenko and Quadri, on the other hand, continue to apply the traditional choice of law rules. They only refuse to recognize that they have a bilateral character.

It should also be pointed out that the method of determining the scope of internal rules by an analysis of their purpose[44] is not foreign to European private international law. At the beginning of this century, Pillet elaborated a similar method.[45] He made a distinction between two categories of rules: *les lois de protection individuelle* and *les lois de garantie sociale*. The purpose of the rules of the first category is to protect individuals against society, the purpose of those of the second category is to protect society against the individual. The former are extraterritorial, the latter are territorial. To determine the circumstances which will justify application of the rule, Pillet determines which state is mainly interested in having the purpose of its rule fulfilled.

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43. Pilenko, "Droit spatial et droit international privé,"5 *Ius gentium* 34 (1953); Quadri, *Lezioni di diritto internazionale privato* 244 (5 ed. 1969). According to Jessurun d'Oliveira, *De Antikiesregel* (1971), Dutch courts have applied the true-false conflict dichotomy since 1913, restricting application of conflict rules solely to the cases where the domestic rules in dispute were different.

44. The very notion of governmental interest has been recognized by several European writers. See *dip américain 109.*

45. *Principes de droit international privé* 265 (1903).

Pillet's theories have been followed by other writers, like Poullet[46] and De Winter.[47] They also influenced the International Court of Justice in the famous *Boll* case,[48] where the court decided that in order to reach its goal of social protection, the Swedish rules on youth protection needed to be applied to all the youths living in Sweden, also to a minor of Dutch nationality. More recently, Pillet's theories were invoked by Francescakis as a justification for his theory of the *règles d'application immédiate*.[49]

One should not disregard the fundamental differences existing between Pillet's approach and Currie's. The latter is unilateralist while Pillet belongs to the school of Savigny. Pillet considers the conflict of laws as a "*conflit de souverainetés*," while for Currie governmental interest is not pre-existing; it must be proved in each case.

In the tort area, it is wrong to believe the European scholars have always—until the last two decades—approved the courts' strict adherence to the *lex loci*. Bourel has pointed out[50] that by the end of the nineteenth century, Von Bar proposed to have the tort of defamation governed by specific rules, an opinion that Meili developed a few years later. Exceptions to the law of the place were again advocated by several scholars after the second world war. Kuratowski considered that the *lex loci* should not be applied to family torts[51] and Wengler adopted the same viewpoint concerning unfair competition.[52]

More fundamental discussions of the *lex loci* rule were proposed during the same period by Drion[53] and Binder.[54] As early as 1949, Drion advocated a theory which may be compared to Ehrenzweig's *lex fori in foro proprio*. On the other hand, Binder proposed that torts no longer be governed in all cases by the law of the place of the wrong but that the courts should first determine "the legal system in the social environment of which the act complained of is rooted." Binder considered that the existence of a com-

46. *Manuel de droit international privé belge* 289 (2 ed. 1928) and 269 (3 ed. 1947).

47. "De sociale functies der rechtsnormen als grondslag voor de oplossing van internationaal privaatrechtelijke wetsconflicten," 1947 *Rechtsgeleerd Magazijn Themis* 101.

48. Affaire relative à l'application de la convention de 1902 pour régler la tutelle des mineurs (dite affaire Boll), Pays-Bas c. Suède, arrêt du 28 novembre 1958, 1958 *C.I.J. Recueil* 55.

49. "Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles de conflits de lois," 1966 *Rev. crit. dip.* 17.

50. *Les conflits de lois en matière d'obligations extracontractuelles* 39 (1961).

51. "Torts in private international law," 1947 *I.L.Q.* 190.

52. 1954 *RabelsZ* 414.

53. "De ratio voor toepassing van vreemd recht inzake de onrechtmatige daad in het buitenland," 1949 *Rechtsgeleerd Magazijn Themis* 57.

54. "Zur Auflockerung des Deliktsstatuts," 1955 *RabelsZ* 480.

mon nationality was not sufficient to abandon the *lex loci*. There had to be a special relationship between the parties.

It may be suspected that Binder found inspiration in the German wartime decree of 7 December 1942 which provided that "claims for extracontractual damages based on an act or omission of a German national committed abroad are governed by German law in so far as a German national has been damaged."[55] One may legitimately doubt whether the original purpose of this decree was to free German courts from the shackles of the *lex loci*, but it has had this effect. Despite its origins, the decree has been held by the German courts to remain in force. Its effect is to require the application of German law to German nationals and to organisations subject to German law regardless where the delict was committed.[56] Moreover, German writers, making a bilateral application of the decree, advocate the application of the law of the common residence of the parties wherever that place of residence might be.[57] Some support for this position may be found in the case law in situations where an accident occurred abroad and the parties were foreign nationals domiciled in Germany.[58]

A similar inspiration could be found as early as 1951, in the Benelux draft on private international law. According to art. 14 of the draft:

> (1) The law of the country where a tort takes place shall determine whether this fact constitutes a wrongful act as well as the obligations which result therefrom.
> (2) However, if the consequences of a wrongful act belong to the legal sphere of a country other than the one where the act took place, the obligations which result therefrom shall be determined by the law of that other country.

To what extent the American scholars were influenced by these theories and legislative precedents is not clear. However Morris' "proper law of a tort"[59] has been, no doubt, an important contribution to the development of the new approach. One must not forget the influential writings of Max Rheinstein[60] and the fact that, in the

55. Translation from Drobnig, *American-German Private International Law* 215 (2d ed. 1972).

56. See also art. 12 E.G.B.G.B. by virtue of which no greater claim can be made in a German Court against a German tortfeasor than is permitted by German law.

57. Drobnig, supra n. 55 at 216; Kropholler, "Ein Anknüpfungs-system für das Deliktsstatut," 33 *RabelsZ* 601, 616-625 (1969).

58. Amtsgericht Ulm, 19.9.1974, *I.P.Rspz.*, 1974, n° 22; Amtsgericht Berlin-Charlottenburg, 5.8.1980, *Deutsches Autorecht*, 1981, 16; Kammergericht (Berlin), 5.5.1980, id., 1981, 58 (all these cases concerned Turkish Nationals domiciled in West Germany, who had been involved in car accidents in a third country).

59. 64 *Harv. L. Rev.* 883 (1951).

60. "The Place of the Wrong: A Study in the Method of Case Law," 29 *Tul. L. Rev.* 4 (1944).

field of torts, Lorenzen found his inspiration in the German case law.[61] Finally, it may be pointed out that Ehrenzweig's *lex fori in foro proprio* found its starting point in the method that was proposed a century ago by von Wächter.[62]

Influence of the New Theories in Europe

The new American theories of choice of law have no doubt had an influence on the law of conflicts of several European countries, which appears in the writings of scholars, in the provisions on choice-of-law included in recent international conventions, statutes or draft statutes and finally in the case law of various countries.

The Writings of Conflict Scholars

The new American approach to tort choice of law has raised great interest in most European countries. Various courses and monographs have been devoted at least in part to the subject.[63] Many scholars have found in the new theories the necessary inspiration to criticize their own conflicts provisions and to propose a more flexible approach. The *lex loci* remains the general rule, but its displacement is advocated in cases where the consequences of the wrongful act belong to the legal sphere of another country, for instance, where the parties share a common nationality and/or there was a special relation between them before the accident took place.

International Agreements and Resolutions

The influence of the new American thinking on recent international agreements or draft agreements has been considerable. One thinks first of the Hague Conventions on the Law Applicable to Traffic Accidents[64] and on the Law Applicable to Products Liability[65] which offer flexible alternative rules in the Second Restatement vein. Indeed, the reporter of the products liability convention was

61. *Selected Articles* 370.

62. See *dip américain* 126.

63. See a bibliography in *dip américain* 345 ff. Audit, "A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles," with comments by Von Mehren, Juenger and Kegel, 27 *Am. J. Comp. L.* 589 (1980). In the tort area, see especially Morse, *Torts in Private International Law* (1978); Kahn-Freund, "Delictual Liability and the Conflict of Laws," II *Rec. des Cours* 1 (1968); Lüer, "The Lex Loci Delicti in Single Contact Cases—A Comparative Study of Continental and American Law," 12 *N.I.L.R.* 124 (1965); Trutmann, *Das internationale Privatrecht der Deliktsobligationen. Ein Beitrag zur Auseinandersetzung mit den neuern amerikanischen Kollisionsrechtlichen Theorien* (1973); Wilde, *Der Verkehrsunfall im internationalen Privatrecht. Ein Beitrag zur Methodik des amerikanischen und kontinental-europäischen Kollisionsrechts* (1969).

64. 4 May 1981.

65. 2 October 1973.

Professor Willis Reese, Reporter of the Restatement Second. These two conventions have been ratified and are therefore in force in several European countries.[66]

The American influence has also found an expression in the tort provisions of the European Draft Convention on the Law Applicable to Contractual and Extra-Contractual Obligations.[67] The *lex loci delicti* remains the basic rule but is displaced when on the one hand there is no significant relationship between the situation caused by the wrongful act and the state of injury and on the other hand the situation offers a significant connection with another country, whose law will then be applied.

A similar inspiration may be found in the resolution adopted by the Institute of International Law at its Edinburgh session in 1969.[68] In the absence of a substantial relationship between the issue in dispute and the *locus delicti*, the courts are invited to apply the law whose determination results from a special relationship between the parties or between the parties and the event. The influence of the new American theories on the drafting of the resolution clearly appeared during the discussions.

New Statutes or Draft Statutes

Recent statutes or draft statutes on private international law have adopted a more flexible approach, putting an end to the universal and unrestricted application of *lex loci* in the tort area.

Thus, art. 31 of the Polish law on private international law[69] provides that:

> Obligations which do not arise from legal transactions are subject to the law of the state in which the event giving rise to the obligation occurred.
>
> However, the national law applies where the parties are citizens of the same state and have their domicile in the state.

Art. 31 appears to cover all torts and all issues in torts. It is also important to notice that a common nationality of the parties is not sufficient to call the exception to *lex loci* into play: the country of

66. The Hague Convention on the Law Applicable to Traffic Accidents has been ratified by the following countries: Belgium, Austria, France, Luxembourg, The Netherlands, Czechoslovakia and Yugoslavia. The Products Liability convention has been ratified by France, Norway, The Netherlands and Yugoslavia.

67. 1973 *Rev. crit. dip.* 209.

68. *Annuaire*, t. 53, II, 358.

69. Law of 12.11.1965, translated by Lasok, 16 *Law in Eastern Europe*: *Polish Family Law* 290 (1968). A French translation may be found in 1970 *Rev. crit. dip.* 344 and Asser, *Les Législations de droit international privé* 295 (1971).

common nationality must coincide with the place of common residence before the exception becomes operative.

In this respect, it is interesting to compare the Polish approach with that of the German Democratic Republic. Art. 17 of the conflict of laws statute of 1975 provides:[70]

> The liability for injuries inflicted outside of contractual relationship, including competency and other personal prerequisites as well as the measure of damages, is governed by the law of the state in which the injury was caused.
>
> . . .
>
> If the person who inflicted the injury and the injured party are nationals or residents of the same state, the law of that state shall apply. This rule also applies to enterprises whose legal statuses are controlled by or which have their principal places of business in the same state.

In this formulation, nationality and residence need not coincide. The *lex loci* can be displaced by the law of the common nationality or by the law of the common place of residence of the parties. On the other hand, the East German statute, like the Polish one, envisages displacement of the *lex loci* irrespective of the degree of connection which either or both parties possess with the *locus delicti* and irrespective of any pre-tort relationship between the parties.

In this respect, comparison with the provisions of the Portuguese Civil Code of 1966 is instructive.[71] Art. 45 of the code provides that non-contractual liability is governed by the law of the state where the principal activity causing the damage took place. In the case of liability for omission, the law of the place where the responsible party should have acted applies. However, where tortfeasor and victim have the same nationality, or, failing that, the same habitual residence, the law of such common nationality or common habitual residence will apply if the parties just happen to be (*se encontrarem ocasionalmente—se trouvent occasionnellement*) in the foreign country whose law would normally be applicable.

Art. 45 seems therefore to require the court to regard the strength of connections between the occurrence, the parties and the *locus delicti*. If the latter is fortuitous and the parties have the same nationality or residence, the *lex loci* will be displaced even if no pre-tort relationship between the parties existed.

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70. "Act concerning the law applicable to international private, family and labor law relationships as well as to international commercial contracts." The statute has been translated by Juenger, 25 *Am. J. Comp. L.* 354 (1977). The translation is preceded by an introductory discussion.

71. Law n° 47-344, 25 Nov. 1966. A French translation may be found in 1968 *Rev. crit. dip.* 369 and in Asser, supra n. 69 at 157.

It should be pointed out that art. 45 further provides that if the law of the state of injury considers the tortfeasor liable, unlike the law of the place where he has acted, the former will apply since the tortfeasor had to foresee that his act or omission would cause harm in the state of injury. This rule is reminiscent of Cavers' first principle of preference.[72]

The very recent 1978 Swiss draft on private international law also merits analysis.[73] Its provisions on torts are reminiscent of the Second Restatement approach. Unlike the statutes which have been analyzed so far, the Swiss draft sets forth a general provision and a number of special rules with the *lex loci delicti* serving a subsidiary function. The draft is based on the theory that some situations are typical enough to be governed by a special rule while the others will be subject to a general provision which has at the same time a subsidiary character.

The policy behind art. 129 of the draft is to have the wrongful act governed by the law of the state in the "social environment" of which the parties are living. It sets forth the general principle that the law of the parties' common residence (*résidence habituelle*) should be applied. If the parties do not have their habitual residence in the same state, then the *lex loci delicti* will be applied. The *locus delicti* will be the state where the tortfeasor has acted or the state where the harm was caused according to distinctions drawn by art. 29. The law of the former state will be applied if the victim has his habitual residence in that state. If on the other hand, the tortfeasor proves that he could not foresee that harm would be caused in the state of injury, this law will not be applied.

Art. 129 will not be applied if the conditions of art. 130 are met, that is, if the disputed facts also give rise to a case of contractual liability, or more generally if the delict also causes injury to a preexisting legal relationship. Such cases are governed by the law applicable to the underlying relationship itself.

Another interesting feature of the draft is the possibility offered by art. 131 to the parties to make a choice *post factum* of the law which will govern the issue of liability. The parties choice is however restricted to the law of their common residence or the *lex fori*.

Specific rules are also provided for traffic accidents (art. 132), products liability (art. 133), unfair competition (art. 134), obstructions to competition (art. 135), defamation (art. 136) and nuisances

72. Cavers, supra n. 31 at 139.

73. Vischer & Volken, *Études suisses de droit international, Loi fédérale sur le droit international privé, Projet de loi de la commission d'experts et rapport explicatif* (1978). See also Knoepfler, "Le Projet de loi fédérale sur le droit international privé helvétique," 1979 *Rev. crit. dip.* and McCaffrey, "The Swiss Draft Conflicts Law," 28 *Am. J. Comp. L.* 235 (1980).

(art. 137). In several of these rules the victim has a choice between two or more applicable laws.

The Swiss draft may therefore in no way be considered as a copy of the Restatement Second. It provides much needed flexibility by proposing alternative rules whose originality—with respect to all other drafts and statutes—must be noted.

In the 1978 Austrian statute on private international law,[74] the *lex loci delicti* remains the basic rule in torts. It is however displaced when both parties have a stronger relationship with another law. It seems that such a relationship may be a common nationality or a common habitual residence. A pre-tort relationship is not required. Two other features of the statute must be emphasized. In the first place, like the Swiss draft, the Austrian statute allows a contractual choice *post factum*. On the other hand, a special conflicts rule is provided for unfair competition—the law of the place where the market affected by the competition is located.

Case Law

The *Babcock* decision has given rise to or developed a consciousness that the traditional *lex loci* rule was too rigid and consequently led in various instances to unjust results. It has therefore been abandoned or amended by several courts in Europe.

In England, on the basis of facts that were similar to *Babcock*, the House of Lords amended its case law in *Chaplin v. Boys*.[75] This leading case involved an automobile accident in Malta. Plaintiff had suffered injury and had brought an action against defendant. Both parties were of English nationality but were living temporarily in Malta with the British Army Forces. The law of Malta, in contrast to the law of England, did not provide for compensation of so-called moral damages. According to the existing case law, set forth in *Phillips v. Eyre*,[76] a tort was actionable as such in England only if it was actionable as a tort according to both English law and the law of the foreign country where it was committed. Despite this precedent, both the trial court and the Court of Appeals applied English law. The House of Lords affirmed the decision. However, the language used by the House is so confused that scholars hesitate whether *Chaplin v. Boys* has reversed the existing case law or is but an exception to the traditional rule. The latter view is expressed by Dicey and Morris.[77]

74. Federal Statute of 15 June 1978 on Private International Law. An English translation and commentary by Palmer, "The Austrian Codification of Conflicts Law," 28 *Am. J. Comp. L.* 197 (1980).

75. [1971] A.C. 356.

76. (1870) L.R. 6 Q.B. 1.

77. Rule 178. He has phrased the exception in the following terms: "But a partic-

In any case it appears that the English approach is very cautious and that the English courts have no intention to follow the lead of their American colleagues. It appears however that *Chaplin v. Boys* is to some extent a by-product of the American conflicts revolution. This is particularly clear in the opinions of Lords Hodson and Wilberforce. Lord Hodson explicitly indicated his preference for an exception framed in terms of the Second Restatement draft on torts.[78] Lord Wilberforce evaluated the Maltese rule and found that there was nothing which suggested that the Maltese state had any interest in applying its rule to the case.[79] He also referred to the draft of the Second Restatement.[80]

The experience of the Benelux countries is worth mentioning. Although the Benelux treaty of 1951 (revised in 1969) never entered into force, it has been applied by several courts in Holland and Luxembourg. Art. 14, already cited, was applied by the Supreme Court of Luxembourg in a 1970 decision[81] in which the Court overturned its previous case law which favored *lex loci*.

A proper law approach has also been adopted in Holland by the Court of Appeal of The Hague[82] and various inferior courts.[83] In *de Beer v. de Hondt*, plaintiff and defendant were Dutch ladies who had agreed to go on a holiday trip to France and elsewhere in a car belonging to the defendant. An accident occurred in France as a result of defendant's negligence in which plaintiff suffered serious injuries. The Court of Appeals of The Hague applied Dutch law. After admitting that the *lex loci* was normally applicable, the Court decided that this law was to be displaced where the consequences of the wrongful act belonged to the legal sphere of another country. In the particular case, both parties were Dutch nationals who lived in the Netherlands and the accident was closely related to an agreement made in the Netherlands which was not exclusively limited to travel in France. The Court did in fact apply art. 14 of the Benelux draft.[84]

In Belgium, on the other hand, the courts have remained reluctant to accept any exception to the traditional *lex loci* rule. Attorneys' arguments in favor of a more flexible rule have constantly

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ular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrance and the parties."

78. [1971] A.C. 356, 380.

79. Id. at 392.

80. Id. at 391.

81. Cour Suprême de Justice, 16.6.1970, *Jurisprudence luxembourgeoise* 347 (1970).

82. Hof's-Gravenhage, 16 juin 1955, N.J. 1955, 615.

83. Rb. Breda, 2 octobre 1962, N.J. 1963, 109; Ktg.'s-Gravenhage, 11 avril 1969; Rb. Haarlem, 12 mai 1970, N.J. 1970, 294; Rb. Amsterdam, 8 février 1972, N.J., 1972, 475.

84. In the more recent case law, see Trial Court of Amsterdam, 30 novembre 1971, N.J., 1972, n° 474.

been rejected,[85] except in a few cases which concerned injuries suffered by relatives of Belgian soldiers stationed in Germany.[86] In these cases, Belgian courts have applied Belgian law but the importance of these decisions may be questioned. The NATO Treaty was indeed applicable and therefore the Belgian court had to apply its own law. In one case however, the NATO Treaty was not applicable[87] and the court made reference to art. 14, ¶ 2 of the Benelux Treaty to justify application of Belgian law.

Another Belgian case also deserves attention. It was decided on 4 November 1976 by the civil court of Antwerp.[88] The case concerned an automobile accident in Germany. Both parties were Belgian. The court pointed out that if a German court were to decide the case it would have applied Belgian law.[88b] The same solution was therefore to prevail in Belgium.

Such a use of the *renvoi* gimmick to avoid application of the *lex loci* rule is reminiscent of the pre-*Babcock* era in the United States. A typical case where a court has resorted to an escape device to reach a result that the traditional rule made impossible is the famous French decision, *Kieger v. Amigues*.[89] In this case, the plaintiffs were the parents of the victim of an accident which had occurred in Germany. Both parties were French nationals. The trial court and the Court of Appeal of Paris refused to apply German law, on the basis of *ordre public*, since it did not provide compensation for moral damages. The court decision was however reversed by the Cour de Cassation.[90]

The *Amigues* case does not stand alone in the French case law.[91] Batiffol points out in the last edition of his treatise that there has been recently a resurgence of public policy in the tort area.[92] It may be suspected that, in a case like *Amigues*, the French court did not so much object to the content of the foreign rule as to its own conflict rule, the rigid application of which leads to unsatisfactory results in some cases.

In Switzerland, the Federal court in a 1973 case decided that

85. See however, Bruxelles, 9 mai 1978, *J.T.*, 1979, 143, *RGAR*, 1979, 10098.

86. See the references in Schuermans & Lavrysen, "Les accidents de la circulation en droit international privé belge," 1974 *Rev. dr. int. et dr. comp.* 20 ff.

87. Civ. Bruxelles, 20 juin 1971, *R.W.*, 1972-1973, 1776.

88. Civ. Antwerp., 4 november 1976, *R.W.*, 1976-1977, 2089.

88b. This interpretation of German law is not supported by the case law. To now, when a car accident between foreigners has taken place in Germany, German courts have not applied foreign law. German writers, however, propose to drop the *lex loci* in such a situation and apply the law of the parties' habitual residence, supra at n.57.

89. Trib. gr. inst. Seine, 2 nov. 1962, *Rev. crit. dip.*, 1964, 111, note Bourel; Paris, le ch., 2 oct. 1963, id., 332, note P.L.; *Clunet*, 1964, 103, note B.G.

90. Cassation, première chambre civile, 30 mai 1967, *Clunet*, 1967, 662.

91. See the cases cited by Batiffol, 2 *Droit international privé*, n. 4.

92. Id.

"the expectations of the parties justify application of the law of their common domicile when the locus delicti appears fortuitous in consideration of the relationship of law or fact existing between the parties, or even if the locus delicti is not fortuitous, when the tort takes place in a specific social environment, for instance in a closed group of persons belonging by their domicile to the same foreign law."[93] The facts of the case were similar to those of *Babcock*. They involved two Swiss citizens who had gone for a trip to France where they had a car accident. The court applied the law of the parties' common domicile.

Finally, it should be pointed out that the *Babcock* approach has extended its influence to Sweden. A center of gravity or grouping of contacts theory was applied a few years ago by a lower Swedish court, but the Supreme Court vacated the decision.[94]

Interest of the New Theories for European Scholars

From our brief analysis of recent developments in legislation and case law in Europe it appears that departures from the *lex loci delicti* are not a purely American phenomenon. The inadequacy of *lex loci* as the uniquely applicable law is gaining acceptance in several European countries. The nature of the exceptions to the general rule differ. The common personal law exception is widely accepted. It is sometimes required however that the parties not only have a common nationality or residence, or both, but also that there be a special relationship between tortfeasor and victim. Some recent legislative enactments, like the Swiss draft or the Hague Conventions on products liability and traffic accidents, have gone further in proposing very flexible and narrow rules which come closer to the Second Restatement approach.

To what extent these recent European developments are a by-product of the American revolution is hard to say. The influence of the new American theories is indubitable but one should not disregard the fact that criticism of the *lex loci* in Europe is older than the *Babcock* decision. The inadequacies of the traditional rule—which Morris perceived in the leading 1949 decision, *Mc Elroy v. Mc Allister*[95]—were the ferment of his famous "proper law of the tort." It is probable however that the American revolution has accelerated the trend toward displacement of the *lex loci* and adoption of a more flexible approach.

93. Tribunal fédéral, première cour civile, 2 mai 1973, Vögtli v. Müller, *Clunet*, 1976, 715.

94. Eek, "Babcock in Sweden," 54 *Calif. L. Rev.* 1957 (1966) and 20 *I.C.L.Q.* 605 (1971).

95. 1949 S.C. 110.

In the same perspective, it must be pointed out that the American penetration of the European case law and legislation is limited to the "most significant relationship" theory, which is the least revolutionary of all the methodologies. In these conditions, it is difficult to say that the European conflicts law is coming closer to the American approach. An analysis of the American case law reveals that interest analysis is the common denominator of the large majority of the decisions, whatever name the courts may give to their own approach; and interest analysis has had very little success so far in Europe.

My third remark concerns the significance of the American conflicts revolution. Indeed, interest analysis is nothing more than a return to the common-law method. The notions of interest and governmental interest, which are not familiar to European lawyers, have a long tradition in the American case law, domestic[96] as well as international. They have been used for decades by courts, including the Supreme Court of the United States,[97] and by conflicts writers.[98] The purpose of Currie, Cavers and others in proposing new methodologies was to have conflict problems solved in the same way that domestic cases were decided and no longer by jurisdiction-selecting rules imported from Europe. As Currie put it in a celebrated article:[99]

> . . . I am proud to associate myself with the common law tradition. We have too long supposed that conflict-of-laws problems can be solved in accordance with a code, transplanted from the continent of Europe, which takes no account of the policies involved in statutes and rules, nor even of the content of the laws that are competing for recognition. It is time to return to methods that are indigenous to our legal system and that our judges and lawyers are fully competent to utilize by reason of their training and experience.

Interest analysis therefore appears to be an American product adapted to the background and tradition of the legal thought prevailing on the new continent. It cannot as such be transposed to European legal systems. One should not forget that most American conflict cases are interstate cases.

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96. "The concept (of State interest) is an old one in other areas of the law, with a respectable place in the law reports of countless jurisdictions." Traynor, "War and Peace in the Conflict of Laws," 25 *I.C.L.Q.* 124 (1976).

97. See discussion and references in *dip américain* 199.

98. Id.

99. "The Verdict of Quiescent Years," in *Selected Essays on the Conflict of Laws* 627 (1963). See also Cook, supra n. 8 at 43 and Cavers, "A Critique of the Choice of Law Problem," 47 *Harv. L. Rev.* 173, 187, 188 (1933).

American scholars have helped make clear that conflicts justice is not perceived in similar terms in Europe and in the United States. One will agree that conflicts justice has the same components on both sides of the Atlantic, but the weight which is given to those components varies greatly.[100]

In the United States the values of simplicity, certainty and predictability which were central to the First Restatement have given way to other substantive values, mainly the furtherance of the policies of the states concerned by a particular issue and the achievement of a just result.

In Europe the traditional values of certainty and predictability are still considered essential, unlike in the United States. It is now realized that furtherance of these values has led to adoption of rules which often do not offer enough flexibility and therefore could lead to unsatisfactory results. However, the central role played by these values in the European conflicts tradition prevents adoption of interest analysis methodologies.

As has already been pointed out, one of the most positive results of the American experience is that it has accelerated in Europe the consciousness that broad jurisdiction-selecting rules may lead in various cases to unjust results and that, consequently, conflicts rules should be issue-oriented and more flexible. The statutes and international agreements which have been elaborated in Europe in recent years have been drafted with this perspective: various factual patterns are distinguished, alternative rules prevail.

This writer has compared the results which were reached in several leading New York tort cases[101] by application of an interest analysis method with those which would have resulted if the court had applied to the same facts the provisions of some recent draft conventions, like the E.E.C. draft or The Hague Convention on the Law Applicable to Traffic Accidents. The result of this comparison has been that in all cases except one the decision of the court would have been identical. The only exception is *Dym v. Gordon*,[102] whose result has been strongly criticized by most conflicts scholars.[103]

This is evidence that conflict rules can be devised which lead to the same results as those achieved by interest analysis. The re-

100. See discussion in *dip. américain* 77.

101. Babcock v. Jackson, Dym v. Gordon, Tooker v. Lopez, Neumeier v. Kuehner. The same type of analysis has been conducted with other leading decisions and the results have been similar. Where the result would have been different by application of the alternative rules, a close analysis of the decision has demonstrated that the Court was wrong.

102. 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

103. 51 *Corn. L.Q.* 779 (1966); 54 *Calif. L. Rev.* 1301 (1966); 34 *Fordham L. Rev.* 711 (1966); 18 *Stan. L. Rev.* 699 (1966); 40 *St. John's L. Rev.* 266 (1966); 65 *Colum. L. Rev.* 1448 (1965).

sources of Savignian rules are numerous and should be resorted to in order to achieve the needed degree of flexibility. The provisions so devised will also provide the required certainty and flexibility and will offer more guarantees of equal justice than interest analysis methodology. The latter gives too much leeway to the courts and often leads to application of *lex fori*. This has been perceived by various courts, mainly in New York, which tend to come back to conflict rules.[104]

One of the main interests of the new American theories for European scholars is that they give us a perspective for the analysis of our own system. Their contribution to the *théorie générale* of private international law is considerable[105] and has often been overlooked by the European conflict writers. In particular, the contribution of interest analysis to the study of unilateralism has no counterpart. The new American theories also offer new and original solutions to the problems of *renvoi*, characterization, public policy (including the better law approach) and the preliminary question which are extremely stimulating. More basically, American scholars have invited us to reflect on the notion of conflict of laws and on the purpose of conflict rules.

104. Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Towley v. King Arthur Rings, 40 N.Y.2d 129, 386 N.Y.S.2d 80, 351 N.E.2d 728 (1976).

105. See discussion in *dip américain*, Book III.

ANDREAS F. LOWENFELD

Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws

I should say at the outset that while I am delighted and flattered by the invitation to participate in this Conference, I am a poor choice if the organizers of the Conference were looking for representatives of current thinking in conflict of laws in the United States. I am not sure there ever was a main stream, at least not since the course set by Beale and Goodrich dissolved into a marshy delta with hundreds of rivulets and canals and no clear central channel. Even so, the majority of my colleagues, dismayed at their failure to solve the problems that they were so good at identifying, looked with both relief and hope to the United States Supreme Court when it granted review last year in a fairly easy motor vehicle accident case. Minnesota, as they all thought, had strayed beyond any permissible bounds in applying its law to a case that obviously called for application of Wisconsin law:[1] in agreeing to take the case, the Supreme Court would obviously restore order to the unruly subject that conflict of laws had become. At the least, it was hoped, the Supreme Court would redefine the banks within which the main stream of conflict of laws might come together again and continue its journey. Unfortunately, as nearly all my colleagues believe,[2] I got involved in the case at the Supreme Court level, and argued it for the party that had prevailed in Minnesota and wound up prevailing in the Supreme Court.[3] I have no regrets about that role. In the first place it was my first argument before the Supreme Court, an exciting and to me very satisfying experience. In the second place I represented a widow with small resources against one of the world's largest insurance companies. In the third place I believe—doubtless more strongly than I did before I assumed my advocate's role—that the solution of our conflict of laws problems must come in small steps and after further experimentation, not in a sin-

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1. Hague v. Allstate Insurance Co., 289 N.W.2d 43 (1978).

2. See e.g. Martin, "Personal Jurisdiction and Choice of Law," 78 *Mich. L. Rev.* 872, 887 (1980); see also Symposium, 10 *Hofstra L. Rev.* (1981).

3. Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981).

gle pronouncement from the United States Supreme Court. I shall return to this theme at the close of my talk. For the moment I want to say only that the majority of American scholars in conflict of laws—with the notable exception of Leflar, who thinks he won[4]—look on me if not quite as a traitor, certainly as one who set back the common cause.

II

If then I can speak at most for myself, I want to make a few general points inspired by the principal papers submitted to the Conference, then make some comments on the draft Convention on the Law Applicable to Contractual Obligations recently issued under the auspices of the European Community,[5] and finally comment briefly on the role of the U.S. Supreme Court in conflict of laws, in the light of the possibilities for a greater role in this area of the Court of Justice of the European Communities.

The most impressive fact that emerged from the papers submitted by Vitta, Siehr, Hanotiau, and Lando is how much all of the authors know about American conflict of laws. I know of no American conflicts scholar, since the generation of the transplanted Europeans such as Rabel, Rheinstein, Ehrenzweig and Nadelmann, who has a comparable knowledge of the development of European conflict of laws. Story, of course, studied the European authorities, and his European contemporaries studied Story.[6] But in the present generation—even though a number of conflict of laws teachers, including Professor Juenger and myself, and also Herzog, Smit, Hay, Baade, Schwind and Kozyris, among others, were born in Europe, speak one or more of the European languages, and have studied other aspects of European law, such as development of the Common Market and its institutions—none of us feels it is part of our required educa-

4. The Supreme Court of Minnesota, following its earlier decision in Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973), adopted Leflar's "Choice-Influencing Considerations in Conflicts Law," 41 *N.Y.U. L. Rev.* 267 (1966) as the guide to its solution to conflict of laws problems. Leflar's criteria (4) and (5)—Advancement of the Forum's Governmental Interest and the Better Rule of Law—and particularly the latter, were the basis of the Minnesota court's decision in Hague v. Allstate: "The Minnesota rule is better," the court said, "because it requires the cost of accidents with uninsured motorists to be spread more broadly through insurance premiums than does the Wisconsin rule." 289 N.W.2d at 49. Professor Leflar wrote to me when the decision was announced, "I had hoped you would win the case, but realized it was a close one." Letter of 1/30/81.

5. 23 *Official Journal of the European Communities* [O.J.] L/266/1, Oct. 9, 1980, reproduced in 2 *CCH Comm. Mkt. Rep.* ¶ 6311-6348 (1980).

6. For precise evidence of the interchange between Story and the European writers on conflict of laws, see Nadelmann, "Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws," 28 *Am. J. Comp. L.* 67 (1980).

tion to keep up with developments in Conflict of Laws in Europe.[7] I have no justification for this, and one result of the Bologna Conference for me will be to pay more attention to what goes on in Europe in this field.

Second, I think there is a kind of cultural Gulf Stream, evident in respect of food and dress, music and manners and sex that has affected the world of law as well. Trends seem to start in California, then move to New York, then sweep the United States and soon cross the Atlantic to Western (and even Eastern) Europe. Like it or not, blue jeans, Mickey Mouse and Coca Cola, McDonald's, hippies and rock and roll, and antitrust, products liability and deregulation all seem to be arriving in an irresistible tide, partly welcome and overdue, but often exaggerated and easily caricatured. There is a temptation to react to the American conflicts revolution in the same way one reacts to the other phenomena mentioned: with a mixture of awe, contempt and resignation.

My perception is that the conflicts fever in the United States has rather cooled down, and is no longer rushing ahead with the momentum of McDonald's or blue jeans or products liability. In New York, for example, after eleven choice of law cases involving personal injury reached the Court of Appeals (the highest state court) in eleven years 1961-1972,[8] there have been only two such cases since 1972, neither resulting in an important opinion.[9] And while it is true that the second Restatement,[10] in preparation at the height of the revolution, did not quite satisfy the thirst for rules (as contrasted with an approach), the prediction that every potential conflicts case would be litigated and appealed because the outcome was always unpredictable seems not to have come true, at least not with the force and frequency once expected.

The charge made by Professor Vitta and others that the rules have become so particularized that reasoning from principle and

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7. As his contribution to the present symposium shows however, Prof. Juenger does have a strong interest in European conflicts of law, possibly because he not only has a European law degree but teaches regularly in Europe.

8. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961); Davenport v. Webb, 11 N.Y.2d 392, 230 N.Y.S.2d 17, 183 N.E.2d 902 (1962); Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Dym v. Gordon, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965); Oltarsh v. Aetna Insurance Co., 15 N.Y.2d 111, 256 N.Y.S.2d 577, 204 N.E.2d 622 (1965); Long v. Pan American World Airways, 16 N.Y.2d 337, 266 N.Y.S.2d 513, 213 N.E.2d 796 (1965); Macey v. Rozbicki, 18 N.Y.2d 289, 274 N.Y.S.2d 591, 221 N.E.2d 380 (1966); Farber v. Smolack, 20 N.Y.2d 198, 282 N.Y.S.2d 248, 229 N.E.2d 36 (1967); Miller v. Miller, 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968); Tooker v. Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969); Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

9. Towley v. King Arthur Rings, Inc., 40 N.Y.2d 129, 386 N.Y.S.2d 80, 351 N.E.2d 728 (1976); Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 405 N.Y.S.2d 441, 376 N.E.2d 914 (1978).

10. American Law Institute, *Restatement (Second) of Conflict of Laws* (1971).

analogy is eroding,[11] is hard to assess. Judge Fuld, for instance, persuaded the New York Court of Appeals to adopt some principles of preference applicable originally only in so-called "guest statute" cases, i.e. cases in which one but not the other state in question excused the driver or owner of an automobile from liability for negligence in an action brought on behalf of a passenger not for hire.[12] But if the rules were persuasive for guest statutes, shouldn't they be persuasive—not automatically binding but persuasive—for cases involving limits on recovery for wrongful death as well? The issue did not come to the New York Court of Appeals, but in two important cases decided by the federal Court of Appeals sitting in New York,[13] the holding was that the guest statute rules did not displace prior holdings of the state court in death cases. In other, more remotely analogous cases, the Fuld rules were applied.[14] I think Vitta has a point, but not an inevitable one. It is true that American lawyers do not think like European lawyers (whether in conflict of laws or in other fields), moving from an Introduction to the General Part to Special Parts of a self-contained system. It is also true that there is no overarching authority in American conflict of laws—whether in the form of a Restatement, a generally accepted treatise, or a Supreme Court setting down obligatory precepts—to guide individual judges deciding particular cases. I do not think, however, that *ad hoc* justice, and excessive discretion to judges, is quite as widespread as is suggested in Professor Vitta's paper.

Vitta is right in suggesting that forum selection becomes more important as the possibility for imaginative choice of law solutions in particular cases expands.[15] Further, he is probably right to suggest that the net effect of flexibility in choice of law has been to apply forum law in favor of domiciliaries of the forum, though it is fair to point out that in two of its leading cases introducing the center of gravity theory, *Auten v. Auten*[16] and *Haag v. Barnes*,[17] the New York Court of Appeals applied foreign law, in the first case to the

11. See e.g. Vitta, "The Impact in Europe of the American 'Conflicts Revolution'," 30 *Am. J. Comp. L.* 1 at 3-4 (1982); Vitta, "Cours General de Droit International Privé," 162 *Recueil des Cours* 9 at 173-74, 185-87 (1979).

12. Neumeier v. Keuhner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

13. Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), cert. den. 414 U.S. 856 (1973); O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), cert. den. 439 U.S. 1034 (1978).

14. See e.g. Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1979), involving a suit by investors in a defunct brokerage firm against the firm's former partners. See also Chiarello v. Domenico Bus Service, Inc., 542 F.2d 883 (2d Cir. 1976), involving the discounting of damage awards for pain and suffering in an accident between New York plaintiffs and a New Jersey bus company.

15. Vitta, "The Impact in Europe of the American 'Conflict Revolution'," n. 11 supra at 6.

16. 308 N.Y. 155, 124 N.E.2d 99 (1954).

17. 9 N.Y.2d 554, 216 N.Y.S.2d 65, 179 N.E.2d 441 (1961).

benefit of an English wife against a New York husband, in the second to the benefit of an Illinois father against a New York unwed mother. The United States Supreme Court appears to have perceived the danger of "hometown justice" resulting from the combination of flexible choice of law and expanded bases of judicial jurisdiction. After two decades without hearing any jurisdiction cases, the Court took four such cases in four years 1977-1980, each time striking down the action of a state supreme court that had sustained the jurisdiction of its own courts over non-resident defendants.[18] In two of the cases the state courts had already applied their own state's law to the action;[19] in the other two cases it was assumed that the state's court would do so if its judicial jurisdiction was sustained.[20] As my colleague Professor Silberman, among others, has pointed out,[21] the Supreme Court may be emphasizing the wrong question in concentrating on the forum rather than on the law to be applied. The result of the Court's almost exclusive attention to jurisdiction, however, is that forum shopping by plaintiffs is fairly easy in actions against professional defendants such as airlines, railroads, insurance companies and major corporations, which do business in all the states; it is not so easy against occasional defendants such as individual motorists, small businesses or stay-at-home spouses.

A precise comparison between the United States and Europe on the subject of forum shopping would take more research than I have recently done.[22] My impression is that the amount of forum shopping now possible in the United States (putting aside the choice between state and federal courts) is not very different from the forum shopping available to a plaintiff in the European Community who takes advantage of the forums permitted under the Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters.[23] Certainly both the American and the European trend is to permit an

18. Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 and Rush v. Savchuk, 444 U.S. 320 (1980).

19. Kulko and Rush, n. 18 supra.

20. Shaffer v. Heitner and World-Wide Volkswagen, n. 18 supra.

21. Silberman, "Shaffer v. Heitner: The End of an Era," 53 *N.Y.U. L. Rev.* 33, 77-90 (1978).

22. For a case by case survey conducted over two decades ago, see deVries & Lowenfeld, "Jurisdiction in Personal Actions—A Comparison of Civil Law Views," 4 *Iowa L. Rev.* 306 (1959). My impression, though not buttressed by the thorough investigation reflected in the cited article, is that while resort to exorbitant jurisdiction has declined, the opportunity for reasonable jurisdiction based on risk-creating activity by non-resident defendants has become easier.

23. 2 *Bull. Eur. Comm.* (1969 Supp. Bull. 2), as amended by Convention of Accession of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 21 *O.J. Eur. Comm.* No. L304/1, 36 (30 Oct. 1978), reproduced in 2 *CCH Comm. Mkt. Rep.* ¶ 6003-6096.

injured plaintiff to bring suit in the state of his injury, and to require the defendant—on penalty of a default judgment enforceable throughout the federal Union/Community—to defend in that state if he has benefited from the state's commerce on a regular basis.[24] Of course at that point Europe and America move in different directions, with the Europeans seeking security through treaties and the Americans on the whole content with diversity. But if one were to take a careful look at any of the proposed conventions relating to Conflict of Laws, I think one would come to the conclusion that the pursuit of certainty collides with the desire for justice almost as often in Europe as it does in the United States. I suspect the conflicts revolution may have already arrived, in a quieter way, in Europe.

III

Let me turn then to the proposed Rome Convention on the Law Applicable to Contractual Obligations.[25] Putting aside the surprisingly wide scope of exclusions in art. 1, let us see what the Convention provides. It begins (in art. 3(1)) by a firm declaration entitled freedom of choice, similar to § 187 of the 1971 Restatement, though broader in that there is no requirement, as in the Restatement, that the issue in question be one that the parties could have resolved by an explicit provision, or that the state whose law is chosen have a relationship with the parties or the transaction. Do the Contracting States really mean it?

They start to take back party autonomy when the choice of a foreign law derogates from "mandatory rules," though I think the retreat from party autonomy is not as great as under the Anglo-American system, because art. 3(4) imposes mandatory rules only where all the other elements relevant to the situation at the time of the choice are connected with a single country. Does this really mean that a French seller and a Soviet buyer can choose to have their contract governed by Swiss law, and therefore to exempt it from export or exchange controls applicable in France? Would the Convention change the outcome in a case like *Regazzoni v. K.C. Sethia (1944) Ltd.*,[26] in which an Indian seller made a contract subject to English law with a Swiss buyer to deliver goods of Indian origin to Genoa, both sides knowing that the goods were destined for South Africa in

24. Compare Jurisdiction and Judgments Convention, n. 24 supra, art. 5-15, with such American cases as Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); and State ex rel White Lumber Sales Inc. v. Salmonetti, 252 Or. 121, 448 P.2d 571 (1968).

25. See n. 5 supra.

26. [1958] A.C. 301.

violation of India's prohibition on trade with that country? Frankly, I don't believe it. But even if one excludes what we may call political trade controls, what about excessive finance charges, exclusions from warranty or contractual limitations of liability?

Well, it turns out that under art. 8 the existence and validity of the contract are governed by the law applicable if the contract were valid, i.e. by the law chosen by the parties, except that a party may rely on the law of his habitual residence to establish that he did not consent, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law chosen by the parties. An American judge accustomed to the second Restatement would find that kind of clause quite familiar.[27] Plainly, it derogates both from the pretension to "freedom of choice" as an absolute and from the goal of certainty in interpretation of transnational contracts. But there is more.

Free choice may be acceptable in contracts between merchants, but not between merchants or public carriers on one side and consumers on the other. The latter presumably neither prepare nor read their contracts, which appear in small print on the back of a purchase order, ticket or similar document, and a choice of law clause in such a contract should not deprive consumers of protections that their home state (or indeed the Community) has seen fit to provide for them. When does this qualification on the principle of freedom of choice apply? Well, if I may translate art. 5(2) into American, if the non-consumer solicited in the consumer's country, or if the consumer did what he had to do (regardless of where formal acceptance takes place) in his own country or he was induced by the seller to travel to the latter's country to make the deal. But these rules don't apply, for instance, to a contract of carriage, unless that contract is for a package tour.[28]

What if there is no choice of law by the parties? Again, it sounds like the Restatement, this time § 188. Art. 4 of the Convention says the contract shall be governed by the law of the country with which it is most closely connected, but a severable part of the contract may be governed by the law of another country with which it has a closer connection. Then there are a series of presumptions to help in determination of the country with which the contract has its closest connection (¶ (2)-(4)), and finally a statement that the

27. See Restatement (Second) of Conflict of Laws § 187(2). For two interesting cases declining to give effect to the law chosen by the parties, see Southern International Sales Co. v. Potter and Brumfield Div. of AMF Inc., 410 F. Supp. 1339 (S.D.N.Y. 1976) and Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63 (S.D.N.Y. 1975). For a detailed analysis and comprehensive collection of recent American cases, see Gruson, "Governing Law Clauses in Commercial Agreements—New York's Approach," 18 *Colum. J. Transnat'l L.* 323 (1980).

28. Convention on the Law Applicable to Contractual Obligations, art. 5(4), 5(5).

presumptions focusing on a particular contact shall be disregarded if it appears from the circumstances as a whole that the contract is most closely connected with another country. For employment contracts the presumptive crucial contacts are somewhat different, emphasizing habitual place of work rather than habitual residence, but again, subject to the "unless it appears from the circumstances as a whole . . ." clause.[29]

Perhaps the most baffling article to one who has read only the Convention and not the *travaux préparatoires* is art. 7, which authorizes but does not require courts to apply the mandatory rules of State B even though the contract is governed by the laws of State A if the contract has a close connection with B. In considering whether to take up this option, "regard shall be had to [the] nature and purpose [of the 'mandatory rules'] and to the consequences of their application or nonapplication."[30] P.S.: mandatory rules of the forum can be applied at any time, regardless of anything in the Convention.[31]

Please don't misunderstand me. I don't mean to make fun of the proposed Convention on Contractual Obligations. I think if I had tried to draft such a convention with my seminar students, it would have come out quite similar. And as Professor Lando points out, it is not clear whether America influenced Europe, Europe influenced America, or the nature of the problem produced the kind of see-saw result that critics of American developments in conflict of

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29. Id. art. 6.

30. The Report to the Council by the Rapporteurs of the group that prepared the Convention states with regard to the use of the words "effect may be given to the mandatory rules of the law of another country"

> . . . after a long discussion, the majority of the Group, in view of the concern expressed by certain delegations in relation to constitutional difficulties, decided it was preferable to allow the courts a discretion in application of this Article.

On the phrase in art. 7, "In considering whether to give effect to those mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application," the Report says

> Far from weakening the rule this subsequent element—which did not appear in the original draft—defines, clarifies and strengthens it. In fact the judge must be given a power of discretion, in particular in the case where contradictory mandatory rules of two different countries both purport simultaneously to be applicable to one and the same situation, and where a choice must necessarily be made between them.

"Report on the Convention on the Law Applicable to Contractual Obligations," by Professor M. Giuliano and P. Lagarde, 23 *O.J.* C 282/1, 27.

31. Convention art. 7(2). The Report on the Convention, n. 30 supra, states (at p. 282/28):

> The origin of this paragraph is found in the concern of certain delegations to safeguard the rules of the law of the forum (notably on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage) which are mandatory in the situation whatever the law applicable to the contract may be.

laws like to point to.[32] But I wouldn't expect the drafters of the Convention to criticize American developments quite as sharply as Professor Vitta has done.[33]

American judges sometimes feel uncomfortable with recent developments in conflict of laws, whether through the Restatement, through the writings of Cavers, Currie, Leflar and their colleagues, or through opinions of Fuld, Traynor and other influential state judges.[34] I suspect, however, that at bottom American judges enjoy conflict of laws problems. In a world increasingly subject to legislative mandate and administrative regulation, the opportunity for a judge to strike out on his own—to engage in applied jurisprudence, if you will—is perhaps not unwelcome to the judges themselves, and to the lawyers (few as they are) who are at home with advocacy in this field. Whether in Europe the relative significance of judicial precedent, in contrast to the authority of code or convention, will increase in this field is an important issue for the future. I should think if the Convention is adopted, reliance on judicial precedent is almost inevitable, because of the Delphic precepts of the Convention itself. It is interesting to speculate whether, say, Italian judges interpreting the Convention will be prepared to follow precedents from France or Germany. That has been the development in the United States, where, as we have seen, a few important state court decisions have made waves far beyond the borders of the states where they are binding. Of course the United States has a common language and 200 years of history and tradition behind it. I would hope the Eurocrats in Brussels would find a way to translate and publicize decisions and commentary in conflict of laws cases so that they can be easily presented to and utilized by courts in all member states.[35] If cross-fertilization of judicial decision does not happen in the Community, even as the volume of transnational activity keeps

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32. Lando, "New American Choice of Law Principles and the European Conflict of Laws of Contracts" 30 *Am. J. Comp. L.* 19 at 32 (1982).

33. See n. 11, supra. It is interesting to read in the Report on the European Convention, n. 30 supra, at p. C 282/28:

> The novelty of this provision [i.e. the discretion of the court in combining mandatory provisions of one law with the law normally applicable to the contract] and the fear of the uncertainty to which it could give rise, have led some delegations to ask that a reservation may be entered on Article 7(1).

34. See, for instance Judge (later Chief Judge) Breitel, dissenting in Miller v. Miller, 22 N.Y.2d 12, 23, 290 N.Y.S.2d 734, 743, 237 N.E.2d 877, 883-84 (1968):

> The unsettled and often conflicting theories with regard to choice of law come to a focus in this [automobile accident] case, exemplifying the anomalies that may be produced, on the one hand, by adhesion to one theory, or, on the other hand, by a determination of particular cases on an ad hoc basis.

35. A start has been made on this in such journals as the European Law Digest, which prints synopses of important decisions of courts of member countries of the Community, including decisions on conflict of laws. Whether these decisions will be regularly cited to and by courts in the ten member states is not yet clear.

expanding, the hope for unification of law suggested by the attempt to write a conflict of laws convention will be unfulfilled. The alternative, contemplated but not provided for in the Joint Declaration issued by the Contracting States as they signed the Convention, is to look to the Court of Justice of the European Communities for authoritative interpretation of the Convention.[36] It is in that context that I want to turn briefly to the experience of the U.S. Supreme Court as umpire on conflict of laws in the United States.

IV

The role of the European Court of Justice, I take it, was inspired in large part by the experience of the United States Supreme Court. There are of course important differences between the Court in Luxembourg and the Court in Washington—notably the jurisdiction of the former to give preliminary rulings and to answer questions put by national courts in the middle of a litigation,[37] and jurisdiction by the latter over a Bill of Rights for individuals. But the basic function of the Court of Justice to see that member states do not impair the flow of goods and persons as mandated by the Treaty of Rome is consciously modeled on the jurisdiction of the United States Supreme Court to review actions of states that may interfere with the flow of interstate commerce as mandated by the U.S. Constitution.

Whatever one may think of its work in other areas, there is no doubt that vigilance by the U.S. Supreme Court over state taxation, registration and licensing requirements, and a variety of local attempts at restraint, preference or protection, has been a success and has played a major role in forging a nation out of separate states with often diverging interests. Though the form of intervention by the Supreme Court was review of decisions of the highest courts of the states, the substance was review of acts of state legislatures or of officials acting under authority of a state. Just last term we saw another illustration of this kind of case, as the Supreme Court held unlawful a "first-use tax" imposed by Louisiana on natural gas extracted off its coast and brought into the state for processing before being fed into interstate pipelines.[38] Observers of the Court of Justice will be able to think of numerous analogous cases in the

36. A comparable Declaration to the original Convention on Jurisdiction and the Enforcement of Judgments of 1968 was converted in 1978 to a Protocol conferring jurisdiction on the Court of Justice to interpret that Convention.

37. Treaty of Rome Establishing the European Community, art. 177.

38. Maryland v. Louisiana, 101 S. Ct. 2114 (1981). Perhaps a better illustration is Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) or Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520 (1959).

Community.[39]

All this just by way of comparison with the function of the Supreme Court in choice of law cases. Here, though the form was the same, the substance was different. The disputes were between private parties on both sides, and (with a few exceptions) the challenge was to the state court itself, not in sustaining or rejecting the actions of the legislature but in exercising its own judgment as to which of two states' law should be applied to a given issue or controversy. I think it is important to keep this distinction in mind. Not only has the Supreme Court's role as umpire involved state vs. state, and not state vs. nation, as in the commerce clause cases. Beyond that, the attempt to turn the controversy into one between the interest of State A and the interest of State B has usually been unconvincing—a legal fiction, a convenience in argument, but often not reflecting reality. Possibly State A has a genuine interest in securing the highest recovery for its injured workers; the idea that State B (as contrasted with an employer or insurance company) would be offended if the worker in the interstate case recovered more than the law of B provided in single state accidents is, to say the last, improbable. To take the *Hague* case that I mentioned at the outset,[40] the dispute involved differing interpretations of a standard clause in an automobile insurance policy; the courts of both states had previously construed the clause in single state contexts,[41] and now the Minnesota Supreme Court undertook to apply its more generous precedent to a policy issued in Wisconsin in favor of the widow who had moved to Minnesota after her husband's accidental death. On the merits it is a doubtful case. But the suggestion that Wisconsin had an "interest" in the outcome, an interest in seeing to it that the widow recover $15,000 and not $45,000, just doesn't stand up. Neither the Attorney General nor the Superintendent of Insurance of Wisconsin was heard from in *Allstate v. Hague*, and no case comes to mind in which officials of State B appeared in the Supreme Court (or in the courts of State A) to assert their state's interest in application of its law.[42]

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39. See e.g. Commission of European Communities v. Italian Republic, Case No. 24/68, [1869] E.C.R. 193, *CCH Comm. Mkt. Rep.* 8079 (July 1, 1969); Société les Commissionaires Réunis v. Receveur des Douanes, Case No. 80-81/77, 1978 ECR 927, *CCH Comm. Mkt. Rep.* ¶ 8, 485, (Apr. 20, 1978).

40. Allstate Insurance Co. v. Hague, n. 1 and 3 supra.

41. Nelson v. Employers Mutual Casualty Co., 63 Wis. 2d 558, 217 N.W.2d 670 (1974); Van Tassel v. Horace Mann Insurance Co., 296 Minn. 181, 207 N.W.2d 348 (1973).

42. Having heard me make this statement, Prof. Juenger called to my attention a brief filed by the State of Nevada in support of the petition for certiorari from Bernhard v. Harrah's Club, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976). In that case the California court applied California law to impose innkeeper's ("dram shop") liability for a California vehicle accident on a restaurant/hotel/gambling complex lo-

At all events it has been difficult to find a constitutional principle around which Supreme Court review of state court decisions in this area could be organized. The Supreme Court, as you know, does not sit as a supervisory court over decisions of state courts, except when federal law or the Constitution are drawn into question. In that sense, the U.S. Supreme Court is analogous to the Court of Justice of the Communities, not to the French *Cour de Cassation* or the German *Bundesgerichtshof*. In the days before *Erie R. Co. v. Tompkins*[43] required federal courts to follow state courts in common law matters, our federal courts occasionally struck out on their own in conflict of laws questions, and the Supreme Court felt free to review their decisions. *Pritchard v. Norton*,[44] for instance, one of the famous decisions establishing the principle of validation of contracts, was such a case. But what the Supreme Court said in cases such as *Pritchard v. Norton* was not binding on state courts, and what state courts said was not reviewable by the Supreme Court, unless it could be said that a state court decision violated the federal Constitution. Conflict of laws, in short, was common law but not federal law.

Several attempts were made—nearly always in controversies involving insurance companies—to engage the Supreme Court in review of state court decisions in conflict of laws cases. One series of cases turned on the clause in the Constitution that provides that no state shall pass any law impairing the obligation of contracts. Could a life insurance company arrange to have its contracts of insurance enter into effect when countersigned by its manager in the company's home office, provide that the law of the place of execution by the company governed, and thus avoid various kinds of anti-lapse and anti-forfeiture laws adopted by states where the insured resided and the policies were sold? Briefly, the Supreme Court said yes, because application of the law of the state of the insured's domicile would violate the contract clause.[45] But by the middle of the 1920s, such reasoning was rejected as unsound.[46]

What about the full faith and credit clause,[47] which (domestic relations aside) had generally made judgments of one state of the United States enforceable in all of the other states? The Constitu-

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cated inside Nevada but just at the California-Nevada state line. The Attorney General of Nevada wrote that Nevada "has a direct interest in the matter before the Court, for the reason that the issues presented will be determinative of whether California law or Nevada law governs activities of Nevada citizens within the state of Nevada." The Supreme Court denied certiorari. 429 U.S. 859 (1976).

43. 304 U.S. 64 (1938).
44. 106 U.S. 124 (1882).
45. New York Life Insurance Co. v. Dodge, 246 U.S. 357 (1918).
46. Mutual Life Insurance Co. v. Liebig, 259 U.S. 209 (1922).
47. U.S. Constitution Art. IV § 1.

tion itself does not mention "judgments," but rather "public Acts, Records, and Judicial Proceedings." Could that clause be read to require the courts of State A to give effect to the statutes—or indeed the common law—of State B? One trouble with the suggestion was that if taken literally in a situation that had some connection with both states, the courts of A would have to give full faith and credit to B's laws and the courts of B would have to give full faith and credit to A's laws.[48] In other words the full faith and credit clause did not (absent a judgment) avoid the choice of law problem.[49] Even Beale, for all his devotion to vested rights, did not, so far as I am aware, ever suggest that his theory was derived from a constitutional mandate.[50] After a brief attempt to use the full faith and credit clause to solve choice of law problems in the early 1930s,[51] that approach, too, was abandoned.[52] In the 1960s, the New York Court of Appeals in the famous *Kilberg* case[53] held that an airplane crash in Massachusetts on a flight from New York gave rise to a cause of action under Massachusetts law but that that state's limitation on recoverable damages would not be applied. When a second case arising out of the same accident came before the federal court in New York, an attempt was made to revive the full faith and credit clause in the choice of law area. The federal court sitting in New York would, of course, have to follow the state court's example unless it were unconstitutional. It was now argued, and indeed held by a panel of the U.S. Court of Appeals for the Second Circuit, that the New York courts could not give half faith and credit to Massachusetts law: ei-

48. This point has been made a number of times, particularly by Justice Stone. See Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532 at 547 (1935); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 at 502 (1939).

49. The Full Faith and Credit Clause remains something of a puzzle. An interesting suggestion, based on contemporary litigation and state legislation, is made by Professor Nadelmann. He suggests that the "Acts" referred to were "acts of insolvency" having the same effect as discharges in bankruptcy, though adopted by state legislatures, rather than by courts, and also "acts of divorce"—i.e. in effect private bills evidenced by a "record," not public legislation of general applicability. Nadelmann, "Full Faith and Credit to Judgments and Public Acts, a Historical-Analytical Reappraisal," 56 *Mich. L. Rev.* 33, 53-57, (1957), repr. in Nadelmann, *Conflict of Laws: International and Interstate, Selected Essays* 169, 188-91 (1972).

50. Home Insurance Co. v. Dick, n. 57 infra, for instance is discussed in Beale's treatise only under limitations of time, and is not considered very important. 3 Beale, *A Treatise on the Conflict of Laws* 1623-24 (1935). As to Bradford Electric Light Co. v. Clapper, n. 51 infra, Beale wrote "It is greatly to be hoped that the decision . . . will not stand; so opposed is it to authority and to the well established rule of jurisdiction." 2 id. at 1326.

51. Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932).

52. Alaska Packers Association v. Industrial Accident Commission, 294 U.S. 532 (1935); Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493 (1939).

53. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

ther that law did not apply at all or it had to be followed all the way.[54] On rehearing, however, Judge Kaufman was able to persuade a majority of the full Court of Appeals that just when devotion to Restatement I was beginning to thaw, one should not return to the Ice Age of conflict of laws under the guise of constitutional interpretation.[55] The Supreme Court declined to review the case.[56]

Only the Due Process clause of the Constitution, I believe, has continuing vitality as a check on actions of state courts in the field of choice of law.[57] But the function of that clause (as I argued to the Supreme Court in *Allstate v. Hague*) is to protect citizens from arbitrary governmental action, not to correct error in order to achieve uniformity in state court decisions. One may differ from that view. I believe Professor Reese, for example, would either reformulate my statement of the function of the Due Process clause, or maintain that when a court steps far enough out of the bounds of reasonableness in applying its own rather than the appropriate law, that is arbitrary action.[58] In fact, in nearly all the choice of law cases that have come before the Supreme Court in the past half century, the decision has been in favor of letting the state court decide as it wishes.[59] Further, in several of the decisions imposing restraints on

54. Pearson v. Northeast Airlines, Inc., 307 F. 2d 131 (2d Cir. 1962) (first hearing).

55. Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 557 (rehearing en banc).

56. Cert. den., 372 U.S. 912 (1963).

57. Very few cases actually invalidated a state's choice of its own law under the due process clause. The leading case to do so, Home Insurance Co. v. Dick, 281 U.S. 397 (1930), involved (i) jurisdiction by a Texas court over a Mexican insurance company through garnishment of the debt of a reinsurance company that did business in Texas; and (ii) a decision by the Texas court that invalidated the one-year period of limitation written into an insurance policy issued in Mexico by the Mexican company on a boat operating in Mexican waters only. The Supreme Court said that under the due process clause Texas "may not affect contracts which are neither made nor are to be performed in Texas." 281 U.S. at 410.

58. See Reese, "Legislative Jurisdiction," 78 *Colum. L. Rev.* 1587 (1978), confirmed by numerous conversations with the present writer.

59. In Alaska Packers Association v. Industrial Accident Commission, n. 51 supra, the Supreme Court sustained a decision of the Supreme Court of California applying that state's compensation law to an accident in Alaska, on the ground that California had been the place of employment. In Pacific Employers Insurance Co. v. Industrial Accident Commission, n. 52 supra, the Supreme Court again sustained a decision of the Supreme Court of California applying that state's compensation law, though the place of employment had been Massachusetts and the accident had occurred in California. In Watson v. Employers Liability Assurance Corp., Ltd., 384 U.S. 66 (1954), the lower federal courts thought they were bound by the Constitution to prevent application of Louisiana's direct action statute to a products liability claim based on injury in that state from a product shipped from out of state, and under an out of state insurance contract precluding direct action against the insurer. The Supreme Court reversed, saying that Louisiana's legitimate interest in safeguarding the rights of persons injured there demonstrates that due process is not violated by application of Louisiana law to the case. Similarly, in Carroll v. Lanza, 349 U.S. 408 (1955), the federal Court of Appeals thought it was bound by the Constitution to apply Missouri law to a claim by a Missouri employee arising out of an accident in Arkansas, because the employee had received his benefits under Missouri Workmen's Compensation law,

the exercise of judicial jurisdiction by state courts over non-resident defendants, the Supreme Court has said that if only choice of law were involved, it would not object to application by the forum of its own law.[60]

While some of my colleagues, as I said at the outset, are unhappy with what they regard as the Supreme Court's excessive permissiveness in this area, I think the trend is correct. If the United States had a national court of appeals in addition to the Supreme Court—a suggestion made from time to time that has never quite caught on[61]—one could foresee a large enough volume of cases, and possibly a willingness to advance, retreat and modify, that might aid in developing conflict of laws method. Given only one Supreme Court that sits only en banc and hears 150 cases a year out of 4000 petitions filed, the likelihood is that a choice of law case would come before the Supreme Court only every five years or so. That fact, and the impossibility of changing a constitutionally-based decision by state or federal legislation, lead to the conclusion, I believe, that assertion by the Supreme Court of its authority to reverse state court decisions would indeed lead back to an Ice Age,[62] when what is needed is a few tropical storms.

I do not mean to get into a full discussion of this subject, lest we commence a debate among the Americans around the table instead of between the Americans and the Europeans. My remarks on this

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and under that law the benefits were exclusive. The Supreme Court reversed, saying that Arkansas, as the state of injury, had a sufficient interest under the due process clause to open its courts and apply its law to the case. Finally, in Clay v. Sun Insurance Office Ltd., 377 U.S. 179 (1964), the lower federal courts thought they were bound by the Constitution to apply Illinois law to a claim under a personal property insurance policy issued in that state to a person who later moved to Florida. The Supreme Court again reversed, saying that Florida, which had a longer period of limitation, had ample contact with the transaction to sustain application of its law under the full faith and credit and due process clauses.

In one case the U.S. Supreme Court reversed on grounds of due process a state court decision applying its own law to a Tennessee insurance contract, Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934). In John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178 (1936) and United Order of Commercial Travelers v. Wolfe, 331 U.S. 586 (1947), the Supreme Court reversed state court judgments that had applied their own law on the basis that the state courts had failed to give full faith and credit to the laws of the other concerned states. Both these cases seem to be aberrations or to have been overtaken by later events.

The last case in the series is of course Allstate Insurance Co. v. Hague, n. 3 supra, in which the Supreme Court upheld the judgment of the Minnesota Supreme Court against a challenge under both the full faith and credit and due process clauses of the Constitution.

60. See Hanson v. Denckla, 357 U.S. 238 at 253 (1958); Shaffer v. Heitner, 433 U.S. 186 at 215-16 (1977); Kulko v. Superior Court, 436 U.S. 84 at 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 445 U.S. 286 at 294 (1980).

61. See e.g. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (The Freund Report) (1972).

62. See the quotation from Judge Kaufman's opinion in Pearson v. Northeast Airlines, supra n. 55.

subject here are prompted only by the suggestion that the Court of Justice of the Community become a conflict of laws court, charged with interpreting the Convention on the Law Applicable to Contractual obligations, as well as subsequent conventions on other aspects of conflict of laws, such as non-contractual obligations. I suppose the terms of reference for the Court of Justice might well be made much broader than those under which the U.S. Supreme Court operates in its review of state court decisions. The Court of Justice could decide, for instance, what are "mandatory rules" under art. 3(3), 5(2), and 7 of the Convention; it might give meaning, over a series of cases, to the term "characteristic performance," which is supposed to point the way to choice of law by the courts when the parties have not made their own choice clear.[63] How it would handle the various clauses calling for determination of the "circumstances as a whole" (art. 4(5); 6(2)(b) and 8) is not clear to me. Are those words for the trier of fact? For individual appellate courts? Or can they be endowed with the kind of analysis from Luxembourg that would provide real guidance to local courts?

The Convention seems to call for just the kind of reasoning—and the kind of advocacy—that have become familiar in the United States in our conflicts revolution. In the United States the Supreme Court cannot do much about it because it sits only as a constitutional court in circumstances where most plausible choices fall within constitutionally permissible bounds, whether the law chosen is that of State A or of State B or some of each. In Europe, if the Convention so provided, the situation would be reversed, in that the Court would always have jurisdiction to interpret the treaty. My feeling is that answering questions in the middle of a proceeding, as under art. 177 of the Treaty of Rome, would be virtually impossible, because on the critical issues the Convention calls for determination on the basis of "the circumstances as a whole." Review of final judgments of state courts—or conceivably response to questions put by the states' highest courts, as under the Protocol to the Jurisdiction and Judgments Convention—might be possible, and might serve to correct gross examples of "hometown justice" such as have occurred from time to time in the United States. But if the American experience is a guide, I would not recommend or expect a major role for the Court of Justice, putting "order" back into the choice of law process.

I do not regard this as defeatist advice. It seems to me that

63. Convention, Art. 4(2). The Report to the Council of Ministers by the Rapporteurs, n. 30 supra, suggests that where one side is to pay money, the other to furnish goods or services, it is the latter that is responsible for the characteristic performance, and in general the law of his habitual residence will be regarded as dispositive. EEC *O.J.* No. 282/20, comment 3 & Art. 4.

choice of law is an interesting but not an orderly field, and I like it that way. I am quite prepared to live without a unified system, provided there is scope for imagination, subtlety, advocacy and persuasion. If we conflicts lawyers can share those aptitudes across the ocean that unites us, I think we have nothing to be ashamed of.

FRIEDRICH K. JUENGER

American and European Conflicts Law

For our colloquium, Professor Vitta has chosen the perfect setting: the city of Bologna, cradle of the civil law and of the conflict of laws. Europeans and Americans alike owe a debt to the labors of the glossators and commentators who in this very spot invented our science. Although our nation did not exist when Irnerius, Bartolus and all the other great doctors taught here, we too can trace our conflicts law back to the simple answer Aldricus once gave to a very difficult question.[1] Let me remind you that our federal system strikingly resembles Upper Italy in the Middle Ages: against the backdrop of a supranational common law our states, like the medieval Italian cities, have developed their own legislation and case law. Thus, American soil has provided the same fertile ground for conflicts, a mixture of diversity and universality, that had once produced the *mos italicus*. Moreover, there was as little in the common law of England as in the Justinian Code to resolve the multistate problems that first appeared in Italy and much later in the New World. Fortunately, the Americans did not have to invent conflicts law from scratch. Soon after the birth of our Republic a great American scholar, teacher and judge synthesized the European learning and added his own in a treatise[2] that impressed even the great Savigny.[3] What Story planted in America's fertile federalist soil quickly took root and has since yielded an indigenous crop of conflicts law and literature. Might it be possible to retransplant to Europe our mutations of European ideas? Or has our conflicts flora become too exotic for European cultivation?

I

The European panelists have given us an ambivalent answer to the question whether American conflicts learning can be exported to their shores. On the one hand, they tell us that there has been no "Americanization" of European conflicts law. But in the same

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1. See Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus, Zweites Stück: Die gemeinrechtliche Entwicklung bis zur Mitte des 13. Jahrhunderts* 66-68 (1916).
2. Story, *Commentaries on the Conflict of Laws* (1834).
3. See 8 von Savigny, *System des heutigen römischen Rechts* iv (1849).

breath they give us many examples of European conflicts developments that look distinctly American. For example, analogues to the Second Restatement's[4] "most significant relationship" formula are found in the conflicts statute of Austria,[5] the Swiss draft,[6] and in a European draft convention.[7] Also, Common Market nations have emulated American practice by combining what we would call full faith and credit with a long-arm statute to produce the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments.[8]

Family law, too, affords good illustrations of European conflicts ideas that parallel our own. A landmark opinion by the German Constitutional Court uses language one would expect to find in American cases.[9] Our "homing trend" has found international recognition in two Hague Conventions,[10] and Professor Siehr's discussion indicates that the better-law idea is no stranger to European courts and writers.[11] And, in the never-ending European discussion about "norms of immediate application"[12] we find arguments that echo Currie's thinking.

Despite such striking parallels, the European panelists deny the Americanization of their conflicts law. In this, I believe, they are correct, because when it comes to conflicts theories, we have not been particularly inventive. Samuel Livermore, the first American to write a conflicts treatise,[13] borrowed from the statutists.[14] Story

4. *Restatement (Second) of Conflict of Laws* (1971).

5. See Palmer, "The Austrian Codification of Conflicts Law," 28 *Am. J. Comp. L.* 197, 203-05 (1980).

6. See McCaffrey, "The Swiss Draft Conflicts Law," 28 *Am. J. Comp. L.* 235, 248-52 (1980).

7. Convention on the Law Applicable to Contractual Obligations, 23 *O.J. Eur. Comm.* (No. L. 266) art. 4 (1980) [hereafter, Contracts Convention]. See also Lowenfeld, "*Renvoi* Among the Law Professors: An American View of the European View of American Conflict of Jaws," 30 *Am. J. Comp. L.* 99, 105 (1982).

8. As amended, 21 *O.J. Eur. Comm.* (No. L. 304/77) (1978) [hereafter, Brussels Convention].

9. See Juenger, "Trends in European Conflicts Law," 60 *Corn. L. Rev.* 969, 977-81 (1975).

10. Convention on the Jurisdiction of Authorities and the Law Applicable in the Matter of Protection of Minors of 5 October 1961, translated in 9 *Am. J. Comp. L.* 708 (1960); Convention on the Law Applicable to Obligations to Support Minor Children of 24 October 1956, translated in 5 *Am. J. Comp. L.* 656 (1956).

11. Siehr, "Domestic Relations in European Private International Law: European Equivalents to American Evolutions in Conflict of Laws," 30 *Am. J. Comp. L.* 37, 47 (1982).

12. See e.g., Audit, "A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles," 27 *Am. J. Comp. L.* 589, 601-03 (1979); Loussouarn, "Les tendances récentes du droit international privé français," 1 *Journées de la Société de Législation Comparée* 681, 688-92 (1979); Sedler, "Functionally Restrictive Substantive Rules in American Conflicts Law," 50 *S. Cal. L. Rev.* 27 (1976).

13. Livermore, *Dissertations on the Questions Which Arise from The Contrariety of the Positive Laws of Different States and Nations* (1828). See de Nova, "The First American Book on Conflict of Laws," 8 *Am. J. Legal Hist.* 136 (1964).

professed to follow Huber's teachings.[15] Joseph Beale cribbed the vested rights theory[16] from Dicey,[17] who had apparently "imbibed [it] from Huber through Holland's *Jurisprudence*."[18] Our modern writers as well lack originality. Ehrenzweig's indebtedness to Waechter has been noted,[19] and Leflar's discussion of result-selectivity recalls Aldricus.[20] The author whose views are now most widely accepted by American judges and writers is the late Brainerd Currie. He was original only in the sense that he reinvented the wheel. If he had read Beale's translation of Bartolus[21] he would have appreciated the venerable age of the idea that choice-of-law problems can be resolved by the "ordinary processes of construction and interpretation."[22] A further glance at Beale's translation of a passage by Coquille[23] would have revealed that the attempt to divine the spatial reach of rules from their underlying policies is several centuries old. In fact, Currie sensed that his ideas were not novel, and he even credited a statutist with having preconceived them,[24] but Currie's lack of comparative and historical perspective made him pick the wrong one.[25] Similarly, as several European panelists have pointed out, the "most significant relationship" formula can be traced to Savigny,[26] though we should recall that Savigny called his notion of the "seat" of legal relationships a merely "for-

14. Livermore even copied his title from Boullenois, *Dissertations sur des Questions qui Naissent de la Contrarieté des Loix et des Coutumes*. See Nadelmann, *Conflict of Laws: International and Interstate* 8 (1972).

15. Story, supra n. 2 at 35, 37. See Lainé, "De l'application des lois étrangères en France et en Belgique," 23 *Journal du Droit International Privé* 241, 481, 486 (1896).

16. See Cavers, *The Choice-of-Law Process* 5-6 (1965).

17. Dicey, *A Digest of the Law of England With Reference to the Conflict of Laws* 22-32 (1896).

18. Yntema, "The Historic Bases of Private International law," 2 *Am. J. Comp. L.* 297, 308 (1953).

19. One author went as far as to call Ehrenzweig "Waechter redivivus," Makarov, "Theorie und Praxis der Qualification," in 2 *Festschrift für Dölle* 149, 177 (1963). See also Baade, Foreword, 28 *Law & Contemp. Prob.* 673, 675 n. 9 (1963); Gamillscheg, Book Review, 28 *RabelsZ* 144 (1963). Contra, de Nova, Book Review, 51 *Calif. L. Rev.* 461, 463 (1963).

20. Compare Leflar, *American Conflicts Law* 212-15 (3d ed. 1977), with n. 32-33 infra and accompanying text.

21. Bartolus, *Conflict of Laws* 27, 45-46 (Beale trans. 1914).

22. Reese & Rosenberg, *Cases and Materials on Conflict of Laws* 470 (7 ed. 1978).

23. 3 Beale, *Conflict of Laws* 1899 (1935).

24. Currie, *Selected Essays on the Conflict of Laws* 379, 612 (1963).

25. See Juenger, "Lessons Comparison Might Teach," 23 *Am. J. Comp. L.* 742, 744 (1975). Concerning the similarities between Currie and more recent European unilateralists, see Hanotiau, "The American Conflicts Revolution and European Tort Choice-of-Law Thinking," 30 *Am. J. Comp. L.* 73, 85 (1982).

26. Siehr, supra n. 11 at 40; Vitta, "The Impact in Europe of the American 'Conflicts Revolution'," 30 *Am. J. Comp. L.* 1, 12 (1982); cf. Lando, "New American Choice-of-Law Principles and the European Conflict of Laws of Contracts," 30 *Am. J. Comp. L.* 19, 32 (1982). The "most real connection" formula was invented by Westlake, who was familiar with Savigny's ideas. See Westlake, *A Treatise on Private International Law* 227-31, 228, 289 (6th ed. 1922).

mal" principle,[27] by which he presumably meant that it can not resolve specific cases but merely restates the problem. That author would hardly have condoned such phrases as "closest connection" in a statute or a treaty, even if he had favored codification, which he did not.[28]

The parallels between American and European thought, whether the results of creative borrowing or of independent reinvention, are not surprising. There may be such a thing as New York, Scottish, French or European conflicts law, but the basic ideas are not peculiar to any country or continent. If any territory has a valid claim to be the fountainhead of conflicts jurisprudence, it is the city of Bologna, where these ideas were first conceived. As Nadelmann reminds us, "everything worthy of trying has been tried before, under the same or other labels."[29] The reason for such universal unoriginality in the conflict of laws should be obvious. By now everyone agrees that we should not simply disregard the choice-of-law problem, as the early glossators[30] and common law judges[31] did. Then how do we tackle it? So far only three basic methods for dealing with multistate problems have been advanced:

(1) the attribution of a spatial reach to local rules;
(2) the localization of legal relationships;
(3) the search for substantive solutions.

These methods have long coexisted. The last one is the oldest:[32] Aldricus' answer to the question which law should govern a dispute between residents of different provinces was to apply the better rule.[33] That is clearly a substantive solution, for if it were applied consistently it would generate a body of rules of certified superiority to govern multistate transactions. Aldricus would have judges do what the Roman *praetor peregrinus* did: to develop a *ius gentium* superior to the *ius civile*. There are other historical precedents for the substantive law approach, such as the *lex mercatoria*, which served Europe as a supranational commercial law, and the practice of English admiralty courts, which pieced together an international

27. 8 von Savigny, supra n. 3, at 210, 211.

28. See von Savigny, *Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft* (1814).

29. Nadelmann, "Marginal Remarks on the New Trends in American Conflicts Law," 28 *L. & Cont. Prob.* 860 (1963).

30. See Neumeyer, supra n. 1 at 1-21.

31. See Sack, "Conflict of Laws in the History of English Law," in 3 *Law: A Century of Progress 1835-1935*, at 342, 344-46, 370-71 (1937).

32. "Aldricus, however, can claim the fame to have founded the scientific doctrine of private international law." Id. at 66-67.

33. "Respondeo eam quae potior et utilior videtur. Debet enim iudicare secundum quod melius ei visum fuerit." Id. at 67.

maritime law from such disparate sources as the mythical law of Rhodes, the *usatges* of Barcelona and the *rôles d'Oléron*.

The idea that the spatial reach of law could be determined by interpretation, either of each particular rule or of groups of rules, was implicit in the statutists' endeavors. Of course, opinions varied on how to perform this remarkable feat. Thus Bartolus relied on the wording of the English rule of primogeniture[34] to divine its territorial purport, an approach that has earned him ridicule ever since. Guy Coquille, writing in the 16th century, looked instead to the "presumed and apparent purpose of those who have created the statute or custom,"[35] which comes close to Currie's precepts. Even Savigny still viewed the conflicts problem as one of determining the territorial dimensions of substantive rules,[36] and both the French and the German Civil Codes ascribed to a "unilateralist" philosophy.

However, for well over a century unilateralism has been in decline and most European conflicts scholars follow a "multilateralist" approach, which is usually identified with Savigny's teachings.[37] But multilateralism also has American roots. Samuel Livermore, whom Savigny does not cite, could claim priority for viewing the conflict of laws as a discipline founded on a "sense of mutual utility"[38] of sovereign nations that form the civilized world, "one great society composed of so many families, between whom it is necessary to maintain peace and friendly intercourse."[39] This was written 21 years before Savigny's famous statement about the "international legal community of nations that deal with each other."[40] Story did not attribute a "seat" to legal relationships, but he classified conflicts problems in the same way as Savigny, i.e., according to broad legal categories, each of which called for an appropriate connecting factor. Thus the American jurist implicitly posed the same question as his German successor, namely: what law governs each legal relationship? Arguably, the European tradition is therefore an American tradition, as the great Martin Wolff suggested when he called

34. See Bartolus, supra n. 21 at 45-46.

35. 3 Beale, supra n. 23 at 1899.

36. 8 von Savigny, supra n. 3 at 2. His volume on private international law bears the title "Control of Legal Rules over Legal Relationships." Id. at 1. The two chapters it contains are entitled "Territorial Limits of the Control of Legal Rules Over Legal Relationships," id. at 8, and "Temporal Limitations of the Control of Legal Rules over Legal Relationships," id. at 368.

Savigny believed that approaching conflicts problems by ascertaining the reach of rules would yield the same results as localizing legal relationships. See id. at 2-3. The difference between these two approaches is discussed by Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* 30-32 (2d ed. 1976).

37. See Audit, supra n. 12 at 590-92.

38. Livermore, supra n. 13 at 28.

39. Id. at 30.

40. 8 von Savigny, supra n. 3 at 27. See also id. at 128.

Story the "secret teacher of the world."[41]

Whoever deserves the credit for inventing multilateralism, that school was highly successful. Seemingly, its victory over the unilateralist statutist school was decisive and complete. Savigny's teachings proved sufficiently powerful even to prevail over statutes.[42] But there have always been rebels, such as Niboyet in France and Quadri in Italy, who questioned the *communis opinio doctorum*. And lately, as a Swiss author has observed, "the statutist theories are experiencing a surprising renaissance."[43] In fact, in Savigny's home country the Constitutional Court not long ago applied a unilateral approach to curb the excesses of exaggerated multilateralism.[44]

II

The current *mos Americanus* favors the unilateralist method. Most courts purport to follow interest analysis; and interest analysts ponder, as the statutists did, the territorial reach of rules. Yet, at the same time, our courts harken back to Savigny whenever they cite the Second Restatement and talk about the "most significant relationship." The results they reach, however, tend to accord with Aldricus' prescription. In other words, our judicial opinions are internally inconsistent, because the various approaches they use simply do not jibe.

But there is method in this madness. Most cases in which American courts have applied the new learning were tort actions that presented a stereotyped pattern: the tortfeasor introduces a defense imported from another jurisdiction, usually a foreign guest statute or a statutory limitation on recovery. Counsel for the victim then presents the court with a number of reasons for not applying that foreign monstrosity. It is "hardly surprising that the great majority of these decisions resulted in the application of a law that was favorable to the plaintiff."[45] This, of course, was the pattern underlying such landmark cases as *Kilberg v. Northeast Airlines*[46] and *Babcock v. Jackson*.[47] In *Kilberg* the New York Court of Appeals still purported to apply the *lex loci delicti*. However, it refused to

41. Wolff, *Internationales Privatrecht* 23 (2d ed. 1949).

42. See Ehrenzweig, *A Treatise on the Conflict of Laws* 312 (1962); Kegel, *Internationales Privatrecht* 88 (4th ed. 1977).

43. Vischer, "Das neue Restatement Conflict of Laws," 38 *RabelsZ* 137 (1974). See also Gothot, "Le renouveau de la tendance unilatéraliste en droit international privé," 60 *Revue Critique de Droit International Privé* 1, 209, 515 (1971).

44. See Juenger, "The German Constitutional Court and the Conflict of Laws," 20 *Am. J. Comp. L.* 290 (1972).

45. Reese, "American Choice of Law," 30 *Am. J. Comp. L.* 135, 136 (1982).

46. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

47. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

honor the Massachusetts limitation on wrongful death recovery whose bite it could avoid by simply invoking the old-fashioned escape device of public policy. In *Babcock*, however, the court scuttled the rigid conflicts rule altogether and instead embraced all of the "modern" theories it could find to avoid applying the Ontario guest statute.

Ever since *Babcock*, eclecticism has reigned supreme. As Leflar observes:

> Most of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law.
>
> * * *
>
> [J]udicial opinions tend to speak simply of the "new" law of choice of law as distinguished from the "old," and to conclude that results arrived at can be supported by citation to the work of just about any of the conflict-of-laws writers who have proposed new ways to solve the old problems.[48]

This tendency to lump incompatible approaches may explain why foreign observers are "puzzled and amazed" by our modern conflicts law.[49] On the other hand, not all Europeans have been purists. Thus, Bartolus already advocated multilateral rules of the type favored by Savigny.[50] Conversely, Savigny recognized the existence of "statutes of a strictly positive, mandatory nature"[51] that did not fit his multilateral scheme. These he considered exceptional, without explaining what the demarcation between rule and exception might be. Instead, he left the respective provinces of multilateral rules and unilateral approaches to such unhelpful guides as legislative intent and the nature of particular statutes.[52] Thus in Savigny's teachings as well the two managed to co-exist. If the current European discussion about "norms of immediate application" and other forms of unilateralism[53] is any indication, matters are no clearer now than they were before.

However, neither are they as simple as learned European com-

48. Leflar, "Choice of Law: A Well-Watered Plateau," 41 *Law & Contemp. Prob.* 10, 11 (Spring 1977).

49. Vitta, supra n. 26 at 2.

50. Such as the *lex loci contractus*, the *lex loci solutionis*, the *lex rei sitae* and the *locus regit actum* rules. See Bartolus, supra n. 21 at 18-20, 27, 29, 35-38, 42-43.

51. 8 von Savigny, supra n. 3 at 33.

52. Id. at 34-35.

53. See e.g., Loussouarn & Bourel, *Droit International Privé* 116-26 (1978); Sedler, n. 12 supra; Vitta, "Cours Général de Droit International Privé," [1978-IV] *Recueil des Cours* 118-32, 137-62.

mentary suggests. Most authors seem to believe that there are but two contending doctrines at issue, namely unilateralism and multilateralism. That is clearly false. To be sure, unlike Bartolus, scholars nowadays avoid such value judgments as characterizing laws as "favorable" or "burdensome."[54] Instead, they view the choice-of-law problem as a search for spheres of "legislative jurisdiction," rather than as a quest for functional solutions to multistate problems. In other words, the emphasis is on method, not on results; they believe the conflict of laws to exist in a rarefied atmosphere of "conflicts justice," far removed from the concerns of ordinary mortals.

Yet, even during the heyday of legal positivism the substantive law approach did persist in various manifestations. One of these is the notion of party autonomy, i.e., the idea that the parties should be free to stipulate the law that governs their transaction. In several areas, most notably in contract choice of law, the principle that people rather than abstract rules should designate the applicable law has withstood countless academic attacks. Similarly, prorogation and arbitration clauses afford astute draftsmen the means necessary to cope with conflicting laws that threaten the stability of multistate transactions. Thus, by permitting the parties to designate the applicable law and the forum, courts and legislatures have substituted a functional solution for one geared to sovereignty and metaphysics.

Result-orientation can also take the form of condoning forum shopping and of liberally recognizing foreign judgments. Thus in the United States expanding notions of jurisdiction have provided plaintiffs with easy access to a plenitude of fora. Take, for example, tort cases. Combined with the all-pervasive homing trend in choice of law, permissive jurisdictional rules enable plaintiffs to sue and to win in plaintiff-oriented states. In other words, this combination achieves the same effect as an alternative reference rule that favors tort victims.[55] But these are, of course, not the only ways in which the conflict of laws can be used to implement substantive policies. Classical conflicts concepts as well permit judges to reach desirable results. It has long been recognized that public policy, *renvoi*, characterization and the incidental question can be manipulated to afford relief from substandard laws.

Why then does our conflicts law seem so strange to European observers? Like us, they should be accustomed to judicial eclecticism and the coexistence of divergent scholarly opinions. The following reasons may explain their puzzlement: First, our conflicts revolution happened in tort law, while in Europe the pressures for

54. See Bartolus, supra n. 21 at 32.

55. Ehrenzweig had fathomed this parallelism even before the "conflicts revolution" broke loose. See Ehrenzweig, supra n. 42 at 597.

change are felt primarily in the field of domestic relations. Second, the sheer bulk of reported American decisions, along with an unprecedented deluge of conflicts literature, is overwhelming. Third, many of our American conflicts writers choose to publish in a prolix and incoherent cant. Fourth, Europeans are disturbed about the nonchalance with which most American courts and legal writers seem to discard all rules to engage in free-style analysis. Finally, the speed of the transition from rigid conservatism to apparent anarchism may come as a shock to the outside observer.

III

It is understandable if some European scholars, bewildered by the seemingly chaotic American conflicts scene, adduce a number of assumptions in their effort to explain the *mos Americanus*. These assumptions deserve comment.

First, one frequently encounters the supposition that the role of the judiciary is somehow different in the United States. Of course there are variations, notably in the status of judges, and these are bound to affect the law. However, it is easy to overrate them. As the European panelists concede, the view that courts are mere mouthpieces of the legislature no longer prevails in Europe. Yet some would claim that European judges do not enjoy the same measure of freedom as their American brethren. In my opinion such a broad statement, if not erroneous, is at least misleading.

European courts are hardly less creative than their American counterparts. For example, in France a revolution that cost quite a few judicial heads lent a certain poignancy to the question of the proper role of courts. And yet, all of French administrative law, which has become a model for the world, is judge-made.[56] Of course, the *droit administratif* is case law out of necessity for there was no statute other than that which granted the *Conseil d'État* the power to adjudicate public law controversies. But even in civil matters the *Cour de Cassation* has liberally made new law, the French Civil Code notwithstanding. Two striking examples are the judicial creation, *contra legem*, of third-party beneficiary agreements[57] and the *de facto* strict liability for accidents caused by "a thing."[58] As regards our discipline, the court has converted the Code's unilateral

56. See e.g., Brown & Garner, *French Administrative Law* 87 (2d ed. 1973); Hamson, "The Executive and the Courts: The English Scene and its French Counterpart," 35 *Can. B. Rev.* 150, 158-60 (1957).

57. Compare art. 1119 of the French Civil Code with 2 Julliot de la Morandière, *Précis de Droit Civil* 291 (1966).

58. See e.g., Walton & Amos, *Introduction to French Law* 203-06, 233-37 (3d ed. 1967); Tunc, "Traffic Accident Compensation in France: The Present Law and a Controversial Proposal," 76 *Harv. L. Rev.* 1409, 1410-12 (1966).

provisions[59] into multilateral choice-of-law rules, developing an "abundant and constructive"[60] case law which is the true source of French private international law.[61] The same is largely true of West Germany,[62] even though the German Civil Code is much younger and more modern than the French.

A comparison of the handiwork of the *Cour de Cassation* and the *Bundesgerichtshof* with, for instance, the Italian statutory provisions[63] suggests that the judiciary is at least as capable of making conflicts law as the legislature. In fact, the Italian legislative deviation from the proper law approach[64] followed by other European countries is one reason why it may be necessary to correct that error by codifying European conflicts law through a contracts convention.[65]

These observations should suffice to cast doubt on the oft-heard observation that European judges cannot, or should not, assume a legislative role. But let me add that not all courts in the United States have been equally innovative and imaginative in dealing with conflicts issues. Even American judges tend to be conservative, and law is, after all, a conservative business. It takes time to accept new ideas and even more time to implement them. New departures are not simply a matter of one judge's subjective evaluation. Even in a court of last resort, freedom is hardly unfettered. The innovator must be able to persuade a majority to sign his opinion, for without their consent it can never become law. Only if there is a pressing need to correct injustices do novel ideas stand a chance of judicial acceptance.

Moreover, it is doubtful whether European or American courts are more to blame, if blame must lie, for overstepping the bounds of judicial self-restraint. Unlike in Europe, in the United States judges have not been as bold as to substitute their judgment for that of the legislature by converting unilateral statutory rules into multilateral ones. Also, European critics might do well to keep in mind, though they might think it paradoxical, that the teachings of Currie, our arch-revolutionary, are not premised on the freedom of judges but

59. Loussouarn & Bourel, supra n. 53 at 100.

60. 1 Batiffol & Lagarde, *Droit International Privé* 20 (6th ed. 1974).

61. Loussouarn & Bourel, supra n. 53 at 23.

62. See Ehrenzweig, supra n. 42 at 312; Kegel, supra n. 42 at 97.

63. The principal Italian conflicts rules are contained in arts. 17-31 of the Preliminary Provisions of the 1942 Italian Civil Code, and arts. 5-14 of the Preliminary Provision of the Italian Code of Navigation.

64. See Preliminary Provisions of the Italian Civil Code art. 25; Preliminary Provisions to the Italian Code of Navigation art. 9.

65. See Giuliano & Lagarde, "Report on the Convention Applicable to Contractual Obligations," 23 *O.J. Eur. Comm.* (No. C 282) 2, 8, 19, 20 (1980).

on their subservience to the legislature.[66] Thus, strange as it may seem to those who deny the judiciary's creative role in shaping the law of multistate transactions, they share Currie's narrow, positivistic view of the division of powers.

A second assumption, closely related to that about judicial freedom, is that about an attitudinal difference toward "legal certainty." But it is of course true on either side of the Atlantic Ocean that proposals for reform, whatever their nature, inevitably run into the pat argument that they will produce chaos. Certainty and predictability do play an important role in the U.S. as well, as shown by our principle of *stare decisis*. Outside the area of torts these values also infuse American conflicts law, as Professor Reese has pointed out.[67] However, justice and consistency can conflict, and it may be necessary to sacrifice one for the other. As Roscoe Pound observed, "law must be stable, and yet it cannot stand still."[68] Is that not also true in Europe?[69] Are we not merely talking about matters of degree?

Professor Vitta, after insisting that in Europe legal certainty is held in high esteem,[70] assures us that European conflicts law is flexible.[71] Here I spot an inconsistency. Certainty requires rigid rules, and flexibility is the antithesis of rigidity. Or should it be possible to practice promiscuous chastity? And how do things look in practice? Having read my share of European conflicts cases, I have found little certainty and much that strikes me as manipulation. Of course, the sophistication with which judges handle the "General Part" of their conflicts law will vary. But some of them seem quite capable of adroitly wielding the scalpels of *renvoi*, characterization and the incidental question, or the meat-ax of public policy, to reach appropriate results in multistate cases. No doubt even European counsel, if they are sufficiently astute, should be able to persuade

66. It is simply not the business of the courts to substitute their judgment for that of the legislature.

* * *

[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources. . . . This is a job for a legislative committee. . . .

* * *

[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary. . . .

Currie, *Selected Essays on the Conflict of Laws* 106, 182, 272 (1963).

67. Reese, supra n. 45, passim.

68. Pound, *Interpretations of Legal History* 1 (1967).

69. See Siehr, supra n. 11 at 68.

70. Vitta, supra n. 26 at 3.

71. Id. at 15.

their courts that the particular case does not fit the general pattern but calls for a tailormade lawsuit. In addition, European lawmakers increasingly favor open-ended formulations that call for *ad hoc* decisions. It is obviously a delusion to believe that the words "most closely connected" as used by Europeans[72] have any more meaning than our Second Restatement's "most significant relationship." But those committed to legal certainty as the ultimate value in the law of conflicts are prone to succumb to this delusion. For instance, the draftsmen of the new Common Market draft convention on contract choice of law, whose precepts my colleague Lowenstein calls "Delphic,"[73] boldly assert that their work product will increase legal certainty and inhibit forum shopping.[74]

And what about forum shopping? This is, of course, the ultimate bugaboo those bent on legal certainty will conjure up to make their point. But if there is reason for concern, why is there so little effort to attack this practice at its roots? A number of European jurisdictional rules openly invite forum shopping. Thus § 23 of the West German Code of Civil Procedure empowers courts to assert jurisdiction over any defendant who has, say, forgotten his underwear in a German hotel.[75] Art. 14 of the French Civil Code permits Frenchmen to sue anyone for anything in the French courts. These jurisdictional bases are blatantly unfair, as art. 3 of the Brussels Convention implicitly acknowledges by outlawing their use against Common Market domiciliaries. If there were any real concern about forum shopping, one would expect a call for national legislation to curtail such exorbitant jurisdictional assertions. If their total abolition should not be feasible, judges could at least be authorized to resist the forum shopper's imposition by exercising a discretionary power of dismissal. But the doctrine of *forum non conviens*, a standard ingredient of American law, has made little headway in Europe.

So far I have assumed that forum shopping is inevitably pernicious, an assumption that pervades European conflicts literature. But what is worse, from the perspective of their clients, than counsel who lack the imagination to ponder the advantages of wisely selecting among available fora? As Professor Siehr suggests,[76] forum shopping may be beneficial because it allows an escape from substandard law. Clearly, there may be good reasons for offering plaintiffs a choice of fora. You may recall the action brought by Dutch

72. See n. 5-7 supra and accompanying text.

73. Lowenfeld, supra n. 7 at 107.

74. See Giuliano & Lagarde, supra n. 65 at 5.

75. Cf. Siegel, "Case & Comment, In Vagrant Verse," 76 *Case & Com.* at 56, 62-63 (September-October 1971) (Austrian law).

76. Siehr, supra n. 11 at 51.

farmers against French mining interests that polluted the Rhine river and damaged seedbeds in Holland. The Court of Justice of the European Communities wrote an opinion that, in effect, condoned forum shopping when it stressed the desirability of keeping alternative fora open to tort victims.[77] A similar endorsement of plaintiff's choice inheres in the European Judgment Convention's provisions on support claimants,[78] consumers[79] and policyholders.[80]

Thus, even in Europe, forum shopping is not universally condemned. Let me add, however, that in practice choice-of-law considerations play but a minor role in counsel's selection of a forum. Attorneys usually serve their own convenience by litigating in their home territory. Some counsel, and their more sophisticated clients, may ponder the strategical advantages of different legal systems. But their choice of forum is generally influenced by such procedural considerations as cost, the quality of the trial bench and bar, the availability of evidence and of discovery devices, as well as the general legal climate of the particular country.[81] Thus, preoccupation with the prevention of forum shopping as the single most important aim of conflicts law appears excessive.

IV

Let me now turn to two real differences between American and European law that may, to some extent, help explain the *mos Americanus*.

Most conflicts problems that arise in American practice are interstate rather than international. Unlike European countries our states share a common language and legal heritage, and they are part of a federal system. In Europe, however, nationalism has destroyed the foundations of a Continental European legal culture that were laid here in upper Italy, and the Latin language has, of course, lost its supremacy long ago.

Thus, it is true that we have a supranational law and language, and you do not. Nevertheless, one may question whether the real

77. Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A., [1976] E. Comm. Ct. J. Rep. 1735; see also Castanho v. Brown & Root (Z.K.) Ltd., [1980] 3 All E.R. 72 (C.A.).

78. Brussels Convention art. 5(2).

79. Brussels Convention arts. 8-12.

80. Brussels Convention arts. 14-15.

81. [I]t is likely that the true causes of forum shopping are to be found elsewhere than in the divergencies of the rules of private international law. The plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage.

Collins, "Contractual Obligations—The EEC Preliminary Draft Convention on Private International Law," 25 *Int. & Comp. L. Q.* 35, 36 (1976).

differences between the private law systems of Europe are as great as many believe they are. After clearing away the conceptual underbrush, one is apt to find remarkably similar rules in the various European laws. Of course, there are splits of opinion, but that is equally true within the United States. In fact, as a noted comparatist has observed, "comparative studies concerning a controversial point, on which there is a division of authority, often show that there are both civil law and common law jurisdictions in each camp."[82] Still, arguably at least, the basic unity and cohesion of American law allows a greater tolerance toward divergences in conflict rules and toward the homing trend.

There is yet another fundamental difference. Most European countries, following the example of the French *Code Civil* and Mancini's teachings, have strayed from Savigny's precepts to embrace the nationality principle.[83] Clearly, citizenship is a legitimate connecting factor, as the Second Restatement recognizes,[84] though Beale said that it is "entirely unnecessary, in an American book upon the Conflict of Laws, to consider nationality at all."[85] After all, the United states has long used this nexus for so onerous a purpose as taxation.

However, to rely on citizenship rather than on domicile poses several problems. The nationality principle obviously does not work well if applied to Americans, Australians, or even Scotsmen. Moreover, it creates difficulties for stateless persons and those with more than one nationality. It also invites discrimination, in particular as applied to domestic relations cases that involve citizens of different countries. Finally, the nationality principle may not fit the needs of mobile societies. Nowadays, millions of aliens from every part of the globe live and work in Europe. Whatever one might say about attempts by emigration countries to retain some hold over their citizens abroad,[86] nations that attract large numbers of immigrants clearly court trouble if they disregard the very real nexus that group of their population has with their new homeland.[87] Stubborn insistence on nationality as the only legal tie that matters is bound to swamp their courts with foreign-law issues. Since it is more difficult, more expensive and more time-consuming to apply foreign law than local rules, immigrants are bound to receive a lesser, costlier and slower type of justice.[88]

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82. Schlesinger, *Comparative Law* 300 n. 40 (1980).
83. See 1 Rabel, *The Conflict of Laws* 120-50, 171-72 (2d ed. 1958).
84. See *Restatement (Second) of Conflict of Laws* § 31 and Comments b, c (1971).
85. 1 Beale, *A Treatise on the Conflict of Laws* 7 (1935).
86. 1 Rabel, supra n. 83 at 165.
87. Id. at 163-64.
88. See Flessner, "Fakultatives Kollisionsrecht," 34 *RabelsZ* 547, 550-55 (1970).

West Germany affords a good example to illustrate the defects of the nationality principle. In that country, it is largely the socially and economically disadvantaged *Gastarbeiter* who have to bear its brunt. Matters are particularly bad, because the Federal Republic's highest court espouses the noble idea that foreign law must be ascertained *ex officio*, an idea which, in practice, founders on the simple fact that few judges are comparatists. Accordingly, they farm out cases involving foreign law issues to learned institutes where experts do what the judges should be doing. Thus the parties not only have to bear the added cost and delay such a procedure entails, but they are deprived of the elementary benefit of having their cases decided by a court of law.

It is hardly accidental that, as Professor Siehr has shown us,[89] the nationality principle is receding in the Federal Republic, a country with more than four million aliens. Indeed, that principle was responsible for the German Constitutional Court's intervention in the field of conflicts.[90] To conform West German conflicts law to the tenets of the Federal Republic's Basic Law, no less than five legislative proposals have since been elaborated.[91] These proposals range from the simple substitution of the domiciliary for the nationality principle[92] to fairly complex alternative reference rules.[93] Thus in West Germany, a conflicts revolution of sorts is brewing, although there the revolutionaries stalk the legislative chambers rather than the courtrooms. As this example shows, something akin to our turmoil is bound to happen whenever old principles clash with new realities.

V

Thus there are good reasons for questioning whether American and European conflicts law and reality are as far apart as is often assumed. It seems to me that the principal differences lie in the realm of doctrine. But there, surprisingly, we have become quite European. As Professor Siehr notes,[94] theory has become an American prerogative, which may be more bane than boon. Much of the

89. Siehr, supra n. 11 at 47.

90. See Juenger, supra n. 44 at 290-91.

91. See Kühne, *IPR-Gesetz-Entwurf* (1980); Neuhaus & Kropholler, "Entwurf eines Gesetzes über Internationales Privat- und Verfahrensrecht (IPR-Gesetz)," 44 *RabelsZ* 326 (1980); Dopffel & Siehr, "Thesen zur Reform des Internationalen Privat- und Verfahrensrechts," 44 *RabelsZ* 344 (1980); Beitzke, *Vorschläge und Gutachten zur Reform des deutschen internationalen Personen-, Familien- und Erbrechts, vorgelegt im Auftrag der Ersten Kommission des Deutschen Rats für internationales Privatrecht* (1981). A draft prepared by the Federal Republic's Ministry of Justice has not yet been published.

92. See Neuhaus & Kropholler, supra n. 91.

93. See Dopffel & Siehr, supra n. 91.

94. Siehr, supra n. 11 at 71. See also Hanotiau, supra n. 25 at 98.

writing in our law reviews is quite abstruse, and the many mystagogic theories there expounded appeal more to the True Believer[95] than the lawyer. Nowadays it is American scholars who attempt to deduce the resolution of multistate controversies from the "nature of the thing." When it comes to conflicts law, it may therefore no longer be true to say, as Professor Lowenfeld does, that "American lawyers do not think like European lawyers."[96]

The effects of overdosing on dogma are illustrated by the astonishing naïveté with which conflicts authors write, ad nauseam, about such vanishing issues as guest statutes, while neglecting important conflicts problems posed by no-fault plans and corporate transactions.[97] We tend to disregard Leon Green's admonition that

> [d]octrine for doctrine's sake may become an obsession with lawyers as it does with preachers and politicians. It feeds on itself; hardens into cliches and blocks the arteries of thought.[98]

Even our Supreme Court has become sufficiently befuddled by conflicting theories to compound the prevailing confusion in the case Professor Lowenfeld discusses.[99] Thus, we Americans are becoming more dogmatic just as you Europeans are taking a more pragmatic stance. In Professor Lando's words, we need more kippers and less caviar.[100]

Still, our scholarship has at least put in issue many firmly held beliefs. American scholars have managed to replace one bad dogma with a number of approaches. Now we have to sort the wheat from the chaff, but that seems preferable to being stuck with plain chaff. If we look at the mushrooming conflicts conventions, statutes and court decisions in Europe, again we find that things there are not all that different. The factual basis for a rapprochement between American and European conflicts law already exists. An unprecedented mobility of persons and transactions has made your Conti-

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95. See Baade, "Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, *The Choice-of-Law Process*," 46 *Tex. L. Rev.* 141, 151 (1967); Peterson, "Weighing Contacts in Conflicts Cases: The Handmaiden Axiom," 9 *Duq. L. Rev.* 436, 441 & n. 30 (1971).

96. Lowenfeld, supra n. 7 at 102.

97. The choice-of-law experts continue to engage in transcendental meditation over guest statutes. . . while the state no-fault legislators are bulldozing away progressive conflicts innovations. . . .

Kozyris, "No-Fault Insurance and the Conflict of Laws—An Interim Update," 1973 *Duke L.J.* 1009, 1033 (1973).

98. Green, "Tort Law Public Law in Disguise," 38 *Tex. L. Rev.* 257, 266 (1960).

99. See Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Symposium, "Supreme Court Intervention in Jurisdiction and Choice of Law: From *Shaffer* to *Allstate*," 14 *U.C. Davis L. Rev.* — (1981).

100. Lando, supra n. 26 at 31.

nent, in Professor Siehr's words,[101] as much of a "conflicts paradise" as the United States. Perhaps our experience can help you save it from becoming a conflicts hell.

It is true that the "conflicts revolution" has made ours an untidy law. However, it seems to me that in most of our cases justice was done.[102] If the end is clear but the means are not, fumbling may be the best policy.[103] Now we are in a position to sort out matters and to ask what the aims of conflicts law should be, and how they can best be accomplished. This will require, first and foremost, the critical sifting of legislative, judicial and scholarly materials, from here and from abroad. If we undertake this task critically and open-mindedly we may find that behind the fog of words, concepts and doctrines there are but a few fundamental ideas whose value has already been tested in the laboratory of legal practice.

Both you and we could benefit from looking at each others' experiences, and once we look at what is essential rather than accidental, we should find much common ground. We Americans could profit from your conceptual prowess, your ability to turn thoughts into statutes, your penchant for elegant simplicity. We, in turn, can offer an emporium of hard-won empirical lessons. You Europeans call law a science. Let us then proceed in the spirit of scientific inquiry rather than to keep reciting the mantras learned from wise old masters.

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101. Siehr, supra n. 11 at 69.

102. See Juenger, "Leflar's Contributions to American Conflicts Law," 31 *S.C. L. Rev.* 413, 419 (1980).

103. Leflar, supra n. 47 at 10.

WILLIS L.M. REESE

American Choice of Law

It is a human tendency to over-simplify. We are frequently tempted to subsume under some simple phrase or catchword matters that in reality are complex and diverse. So it is with American choice of law. Frequently it is said that this law is extremely flexible and fluid, that it disregards almost entirely the values of predictability of decision and uniformity of result and that what results, in effect, is a system of *ad hoc* decision. Conclusions of this tenor can be based on the opinions of some American courts and on the writings of some American authors. Also, it is hardly surprising, in view of what Americans themselves have said, that this rather simplistic view of American choice of law is the one that is generally held in Europe. The attempt will be made in this paper to demonstrate that this view presents a distorted picture of the situation that actually exists.

The great majority of the recent choice-of-law cases in the United States have involved suits brought to recover for personal injuries. This is an area where there is little predictability of result even in local law. In part this is because tort cases in the United States are frequently decided by juries. In part this is also because the legal principles involved are vague and imprecise. So, for example, the propriety of an actor's conduct is frequently measured against that of the mythical reasonable man[1] and there is no liability for consequences that are caused by a negligent act but are not "proximate" in nature.[2] In addition, the field of personal injuries is one where persons rarely look before they leap and where they rarely contemplate the consequences of their conduct before engaging in it. Predictability of result and uniformity of decision are not, therefore, values of particular significance in this area of the law. It is a field where accordingly there is less than the usual need for precision in the applicable rules of choice of law.

Imprecision is not, however, a characteristic of all rules of choice of law in the area of personal injuries. It is clear, for example, that the conduct of the driver of an automobile will be judged in

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1. See generally Prosser, *Torts* 149-166 (4th ed. 1971).
2. Id. at 236-290.

the light of the requirements of the state where the conduct takes place.[3] So, the applicable rules of the road, namely, speed limits and the like, are those of the state where the automobile happens to be at the crucial time. Speaking more generally, it can be said that, except perhaps in extraordinary circumstances, the law of the place of conduct and injury will be applied to determine the tortious quality of that conduct.[4] This is as it should be for at least two reasons. It would be unfair to hold a person liable for the consequences of an act that complies in all respects with the requirements of the state of conduct and injury. Contrariwise, the interests of the state where a person acts require that liability should be imposed for conduct that does not meet its standards even though it would meet the requirements of some other state with a close relationship to the parties as, for example, the state of common domicile or of common nationality.

To date, most of the American choice-of-law decisions in the area of personal injuries have dealt with more peripheral issues. They have been concerned, for example, with the availability of certain defenses, such as the applicability of a guest-passenger statute[5] or of one limiting the permissible amount of recovery,[6] with the question whether a given interest of the plaintiff is entitled to legal protection, as, for example, whether a wife is entitled to recover for the loss of her husband's consortium,[7] and with the question whether negligence on the part of the plaintiff should bar his recovery completely or result only in its diminution.[8] None of these decisions involved situations where there was any substantial likelihood that the defendant had acted in reliance upon the applicability of a particular rule of law. Also, many of the defenses raised, such as guest-passenger statutes and limitations upon the amount of recovery, could be said to be out of tune with the times, as evidenced by the fact that there was a widespread movement throughout the country to repeal the statutes that provided for them.[9] Under the circumstances, it is hardly surprising that the great majority of these decisions resulted in the application of a law that was favorable to the plaintiff. Indeed, the decision to favor the plaintiff by avoiding the application of an out-of-date law was undoubtedly

3. See e.g. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

4. *Restatement, Conflict of Laws Second* § 145, Comment *d* (1971).

5. See e.g. Babcock v. Jackson, supra n. 2.

6. See e.g. Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727 (1967).

7. See e.g. Casey v. Manson Construction and Engineering Co., 247 Or. 274, 428 P.2d 808 (1967).

8. See e.g. Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968).

9. Reese & Rosenberg, *Cases and Materials on Conflict of Laws* 556 (7th ed. 1978).

one of the reasons why the courts were willing to espouse a flexible approach to choice of law. It permitted them to reach the result they desired without having to state frankly that avoidance of a particular law was their primary motivation.

Recently however, there has been some movement toward the establishment of more precise rules of choice of law. So, in the guest-passenger area, the New York Court of Appeals has attempted "the formulation of a few rules of general applicability, promising a fair level of predictability."[10] These are:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
>
> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
>
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., pt. II, §§ 146, 159 [later adopted and promulgated May 23, 1969].)

To date, these rules have not been widely adopted by the courts of other states.[11] They are, nevertheless, believed to be of considerable significance. First of all, they reveal an unwillingness, which is becoming increasingly widespread throughout the country, to adhere to the former rule which provided for the decision of all issues in tort by the law of the place of injury.[12] This rule is too all-encom-

10. Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454 (1972).

11. They were generally approved in First National Bank v. Rostek, 514 P.2d 314 (Colo. 1973); Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970). They were disapproved in Labree v. Major, 306 A.2d 808 (R.I. 1973).

12. Hagermann, "The 'New Learning' and Choice of Law in Tort Cases," 22 *S.D. L. Rev.* 253 (1977); Comment, "Abandonment of Lex Loci Delicti in Texas," 33 *S.W.L.J.* 1221 (1980).

passing in scope, and experience has shown that it does not lead to good results when applied to issues of the sort described above, particularly in situations where the place of injury can be said to be fortuitous and to bear little relation to the parties. On the other hand, the formulation by the New York Court of Appeals of choice-of-law rules of a narrower scope represents judicial dissatisfaction with a system of *ad hoc* decision and a recognition of the importance of predictability and uniformity of result. It may be that the Court of Appeals has taken the initial step in what may develop into a nationwide movement to develop new rules of choice-of-law in the area of tort.

Contracts is an area where there is a real need for predictability of result in choice of law. In contrast to the situation that usually obtains in torts, parties enter into contracts with forethought and give advance consideration to what their rights and obligations will be. Such predictability of result is usually attainable in American choice of law. This can be done by the insertion into the contract of a choice-of-law provision. Such provisions will usually be respected in the United States.[13] This will always be the case with respect to issues that fall within the contractual capacity of the parties as, for example, questions relating to conditions precedent and subsequent, to excuses for non-performance and to sufficiency of performance. Usually, it seems safe to say, a choice-of-law provision will be given effect in the case even of issues that do not lie within the contractual capacity of the parties. Here, of course, there are limitations and the nature of these limitations cannot be stated, it is believed, with precision in any known body of law. In Europe and in the United Kingdom it is frequently said that the parties cannot by means of a choice-of-law provision escape a "mandatory" or "imperative" law of an interested state.[14] The tests for determining whether a particular law fits into one of these categories are, however, rather vague in their nature. Similar limitations upon the power of the parties to choose the law governing their contract are to be found in the United States. So it is said in § 187 of the *Restatement of Conflict of Laws Second* that effect will be denied a choice-of-law clause when "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." The Restatement Second tells us that "an important consideration" in determining whether a substantial policy is involved is the extent

13. See generally, *Restatement, Conflict of Laws Second* § 187 (1971).

14. Dicey & Morris, *Conflict of Laws* 755-756 (10th ed. 1980).

to which the significant contacts are grouped in the state of the otherwise applicable law. The more contacts there are in this state, the more will the forum be inclined to find that a given rule of that state embodies a fundamental policy. Contrariwise, the more the contacts are grouped in the state of the chosen law, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision. Another important consideration is, of course, the nature of the policy involved. It is more likely to be considered fundamental if it has a protective purpose, such as to protect a person against the oppressive use of superior bargaining power,[15] or is intended to discourage certain activity, such as in the United States conduct that violates the anti-trust laws.

Predictability of result is clearly more difficult to achieve in situations where the contract does not contain a choice-of-law provision. Here the Restatement Second resorts to a grouping of contacts approach in § 188 and then in later sections seeks to provide greater certainty and precision by singling out certain contracts where, on the basis of the decided cases, it seems possible to say that a certain contact will usually be in the state of the governing law. So it is said that a contract for the sale of an interest in land will usually be governed by the law of the situs,[16] that the law of the place of delivery will usually be applied to govern a contract for the sale of an interest in a movable[17] and that the law of the insured's domicile will usually govern a life insurance contract.[18] Admittedly, these are not hard-and-fast rules and they are subject to exceptions. But surely they provide as much predictability of result as does the rule in the United Kingdom that a contract is governed by its own "proper law."[19] Also, it is doubted whether substantially greater precision and predictability of result are obtained by the choice-of-law rules currently in force in the countries of Western Europe.

It is perhaps worth noting that torts has been by far the most fertile field in the United States for choice-of-law decisions. By way of comparison, comparatively few cases have been decided in the area of contract. One reason for this disparity is undoubtedly the fact that many contract cases are submitted to arbitration. Another reason is presumably the growing practice to insert choice-of-law provisions into contracts. Still a further reason may be that contract

15. See e.g. Southern International Sales Co., Inc. v. Potter & Brumfield Division, 410 F. Supp. 1339 (S.D.N.Y. 1976).

16. *Restatement, Conflict of Laws Second* §§ 189, 190 (1971).

17. Id., § 191 (1971).

18. Id., § 192 (1971).

19. See Dicey & Morris, supra n. 14 at 747-775.

cases lend themselves more readily to out-of-court settlement than do cases in tort.

It is today uncertain whether the new approaches in American choice of law will be extended to still other fields. A handful of cases espousing modern theories has been handed down in the area of workers' compensation,[20] and what might be described as a driblet of cases has involved still other areas.[21] By and large, however, choice-of-law rules in areas other than torts and contracts remain unchanged and the question is whether this situation will continue in the future.

Workers' compensation provides for strict liability. The employer, and sometimes other parties as well, are strictly liable to the employee for injuries the latter suffers in the course of his employment. These laws, however, require the employee to give a *quid pro quo*. The amount of his recovery in workers' compensation is strictly limited and, in addition, he is deprived of any remedy in tort against certain persons. Immunity from liability in tort is almost invariably granted the immediate employer and, under the law of some states, similar protection is extended to other persons as, for example, a principal contractor in a case where the immediate employer of the employee is a subcontractor. It is here that the laws of the several states are likely to differ. As has been stated, the immediate employer will almost invariably be made immune from tort liability, but there are differences among the states as to whether similar immunity is enjoyed by a principal contractor. The majority of courts in the United States have looked to what they conceive to be the policy underlying workers' compensation in fashioning their choice-of-law decisions. This policy is said to be that one who is required to provide workers' compensation protection under the law of a given state should be entitled to the immunity from tort liability that is given him by that law. *Wilson v. Faull*[22] is a case in point. In that case, the employee, his immediate employer, the subcontractor, and the principal contractor were all residents of New Jersey, and the contract of employment was made in that state. The employee, however, was injured while at work in Pennsylvania. He brought suit in tort against the principal contractor in New Jersey, as he would have been permitted to do by New Jersey law. Relief was denied, however, on the ground that under the law of Pennsylvania the principal contractor owed the employee an obligation in workers' compensation and was given immunity from liability in tort. The court found support for its holding in "the basic policy underlying

20. See e.g. O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978).

21. See e.g. Estate of Crichton, 20 N.Y.2d 124, 228 N.E.2d 799 (1967) (succession to movables).

22. 27 N.J. 105, 141 A.2d 768 (1958).

the adoption of Workmen's Compensation acts by the several states as the exclusive remedy for industrial accidents." It will be noted that this case was decided by a New Jersey court and that New Jersey clearly had a greater interest in the case and the parties than did Pennsylvania. Nevertheless, the court disregarded the interests of its own state in recognition of what it deemed to be the basic philosophy underlying workers' compensation laws.

Some courts, on the other hand, have not followed *Wilson v. Faull*, and have permitted recovery in tort when such recovery would be allowed by the law of what was thought to be the state with the greatest interest in the matter.[23] These cases, however, are believed to be in the minority.

What is believed to be the majority view on this aspect of workers' compensation in the United States is stated as follows in § 184 of the Second Restatement:

> §184. Abolition of Right of Action for Tort or Wrongful Death
>
> Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which
>
> (a) the plaintiff has obtained an award for the injury, or
>
> (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§187-188 and 196.

To date, the cases appear to be unanimous in holding that the validity and effect of transfers of interest in land are governed by the law of the state where the land is situated.[24] There have, however, been some rumblings of academic dissent,[25] and the question is whether the simple rule that now exists will eventually be abandoned. Clearly it should not be, and presumably will not be, in the case of issues in the decision of which the state of the situs has the greatest interest. Examples of such issues are who may own the land, the uses to which land may be put, and the conditions under which land may be held. So, the law of the situs will be applied to determine whether the land can be used for residential purposes

23. See e.g. O'Connor v. Lee-Hy Paving Corp., supra n. 20.

24. *Restatement, Conflict of Laws Second* § 223 (1971).

25. Hancock, "In the Parish of St. Mary le Bow, in the Ward of Cheap," 16 *Stan. L. Rev.* 561 (1964); Weintraub, "An Inquiry into the Utility of 'Situs' as a Concept in Conflicts Analysis," 52 *Corn. L.Q.* 1 (1966).

only or whether it can also be put to commercial use. This law will also be applied to determine what restrictions, if any, are imposed upon the ownership of land by a corporation or by an alien as well as the period during which the power to alienate interest in land may be suspended.

There are some issues, on the other hand, with respect to which the state of the situs may not be the state of the greatest interest. So, for example, some state other than that of the situs may have the greatest interest in the issue whether the particular transferor has the capacity to transfer the interest in the land and whether the particular transferee has capacity to take and hold this interest. Likewise, by way of further example, there will be occasions where some state other than that of the situs may have the greatest interest in the question of a will's validity or whether the will had been revoked. To date, however, it has been uniformly assumed that all issues relating to the transfer of interest in land should be decided in the same way as would the courts of the state of the situs. So, if the courts of that state would apply their own law to the decision of the case, the courts of others states will do likewise, and this will be so even in those circumstances where some other state might be thought to be the state of greatest interest. There are substantial reasons that support this rule that calls for application of the law of the situs. Transactions involving land will not be entered into until considerable thought has been given by the parties and their lawyers to the possible consequences. This is an area where it is of the utmost importance that there be certainty, predictability and uniformity of result, and it seems clear that these values can most readily be obtained by application of a simple rule that the law of the situs governs. Application of this rule is also supported by the needs of title search, which will obviously be facilitated if draftsmen and title searchers need consult only a single law and that the one with which they are most familiar. Substantial arguments can, therefore, be advanced for maintenance of the rule that the law of the situs should be applied to determine all issues relating to the transfer of interests in land. To date the courts have evinced no tendency to abandon this rule, and it is thought that there should be no such abandonment unless good cause is shown for such action.

Inter vivos conveyances of interests in movables present greater complexities. A basic distinction must here be drawn between two situations. The first is where the issue arises between the parties to a single conveyance and the second is where the issue relates to the effect of a conveyance upon the pre-existing interests of one who is not a party to the conveyance. Examples of issues involving the first situation are the validity of the conveyance and the nature of the interests in the movable that were conveyed as, for example, whether

the transferee received full title to the movable or only a security interest. Falling within the scope of the second situation are controversies between persons who claim interests in the chattel by reason of different transactions. A typical problem is whether a transferee who has paid value for a chattel and has taken the same in good faith will take precedence over a previously created security interest, such as a chattel mortgage or a conditional sale.

Issues arising between the parties to a conveyance are likely to have both property and contractual aspects. Hence, it is not surprising that the courts have adopted what is essentially a contract approach in determining what law governs such issues.[26] If the parties have designated the law which they wish to have govern the conveyance, that law will be applied under the same circumstances as would a law chosen to govern the validity and effect of a contract.[27] When no law has been chosen, the courts adopt essentially the same grouping of contacts approach that they do in contracts except that in the case of conveyances there is an additional contact to be considered, namely, the place where the movable (or group of movables) was located at the time of the conveyance and the place, if such a one there be, to which it was understood that the movable would be moved after the conveyance.[28] All in all, choice of the law governing conveyances of interests in movables in this first situation presents essentially the same problems, and certainly involves no greater uncertainties, than does the choice of the law governing contracts in general.

By way of contrast, a hard-and-fast choice-of-law rule applies in the second situation that involves the conveyance of interests in movables. This is that the effect of a conveyance upon pre-existing interests in a movable is determined by the law of the state where the movable was located at the time of the conveyance.[29] This rule stems inexorably from the fact that it is essential that a person should be able to know before he deals with a movable what law will govern the effect this dealing upon existing interests in the movable. Frequently, a person will have no way of knowing what other persons, if any, have previously dealt with the movable and in what states the movable has previously been located. Hence, the only law that could feasibly be selected is that of the state where the movable was located at the time of the conveyance to the person in question.

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26. See e.g. Youssoupoff v. Widener, 246 N.Y. 174, 158 N.E. 64 (1927); *Restatement, Conflict of Laws Second* § 244 (1971).

27. Id. § 244, Comment *c* (1971).

28. See generally id. § 244 (1971).

29. Id., § 245 (1971).

Cammell v. Sewell,[30] an English case, provides a good example of the rule in action. The case involved a cargo of lumber that had been shipped on board a Prussian vessel from a Russian port and that was scheduled for delivery in England. The ship foundered on the rocks off the Norwegian coast. In accordance with Norwegian law, the lumber was there sold at auction to a person who thereafter sent the same to the defendants in London. The plaintiff insurers, who had paid the full value of the lumber to the original purchaser, demanded delivery of the same from the defendants and, upon their refusal to comply, brought suit for conversion. The court rendered judgment for the defendants on the ground that, under the law of Norway, title to the lumber had passed to the purchaser at the auction sale. So far as is known, the rule of *Cammell v. Sewell* has been applied without a dissenting voice in the United States.[31]

Hard-and-fast rules of choice of law are also to be found in the case of succession. In the case of succession to interests in land, whether by will or intestacy, the law of the state where the land is situated controls.[32] On the other hand, the law governing succession to interests in movables is the law of the state where the decedent was domiciled at the time of his death.[33] It is desirable that, insofar as possible, an estate should be treated as a unit and, to this end, that all questions of succession to interests in movables should be governed by a single law. The law of the state of the decedent's domicile at the time of his death is the law selected, presumably at least in part for the reason that this is the state which would usually have the dominant interest in him.

Trusts are a peculiar Anglo-American institution. Suffice it to say that here too American choice-of-law rules afford a fair measure of predictability. Trusts of interests in land, whether testamentary or inter vivos, are governed by the law of the state where the land is situated.[34] In the case of trusts of interests in movables, the law chosen by the settlor will be applied, whether the trust is testamentary or *inter vivos*, except in the rare situation where application of the law would violate a fundamental policy of the state which has the dominant interest in the decision of the particular issue.[35] Where the settlor has not chosen the governing law, the validity of the trust will almost invariably be upheld if it complies with the requirements either of the state of the settlor's domicile or of the state

30. 5 Hurl. & N. 728 (1860) (Court of Exchequer Chamber).

31. See e.g. Hervey v. Rhode Island Locomotive Works, 93 U.S. 664 (1876); Universal Credit Co. v. Marks, 164 Md. 130, 163 A. 810 (1938); Goetchius v. Brightman, 245 N.Y. 186, 156 N.E. 660 (1927).

32. *Restatement, Conflict of Laws Second* §§ 236-240 (1971).

33. Id., §§ 260-264 (1971).

34. Id., §§ 277-279 (1971).

35. Id., §§ 269-270 (1971).

where the trust is to be administered.[36] Protection of the expectations of the settlor by upholding the validity of the trust is the value to which the courts have attached most importance in fashioning rules of choice of law in this area.

The law governing marriage is an intrinsically complicated subject in all systems of law. This is because the question of a marriage's validity is normally raised in conjunction with another question as, for example, whether one person will succeed from another, whether a child is legitimate and the like. The inevitable question is whether the law governing the validity of the marriage should be dependent upon the law governing the question to which the validity of the marriage is incidental. To date, questions of this sort have rarely been raised by American courts. Marriages that met the requirements of the state where the marriage was contracted have usually been recognized as valid.[37] There are only a surprisingly few cases where a marriage good under the law of the state where it was contracted has been invalidated in deference to what was deemed to be the strong policy of the state of dominant interest, which was normally the state where both spouses were domiciled at the time that the marriage took place.[38]

Corporations is the last area that will be mentioned. Two types of corporate activities must here be distinguished. The first type comprises acts of a sort that can likewise be done by an individual as, for example, the commission of a tort, the making of a contract, and the ownership of property. Such acts are determined by the same choice-of-law principles as are applicable to individuals.[39] Belonging to the second type are activities that cannot in the nature of things be engaged in by individuals and that are peculiar to corporations and other associations. Activities of this sort involve primarily a corporation's relationship to its shareholders, and include, by way of example, the election or appointment of directors and officers, the adoption of by-laws, the issuance of corporate shares, the holding of directors' and shareholders' meetings and methods of voting including any requirement for cumulative voting. To date, in the absence of statute, the law of the state of incorporation has been applied almost invariably to govern corporate activities of the second type.[40] It is important that activities of this sort should be regulated by a single law. The law of the state of incorporation is the one selected

36. Id. at § 269-270; Matter of Chappell, 124 Wash. 128, 213 P. 684 (1923); Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937); Cross v. United States Trust Co., 131 N.Y. 330, 30 N.E. 125 (1892).

37. *Restatement, Conflict of Laws Second* § 283 (1971).

38. See e.g. Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958).

39. *Restatement, Conflict of Laws Second* § 301 (1971).

40. Id., § 302 (1971).

because this state will usually have the greatest interest in the issue to be decided and the parties, to the extent that they thought about the matter, would usually expect that this law would be applied. There have been a very few cases where, in the absence of statute, the law of some state other than that of incorporation has been applied.[41] These have all involved situations where the corporation did little or no business in the state of incorporation and conducted most of its affairs in the state whose law was applied. But to reiterate, cases of this latter sort are few in the extreme.

Closely allied to corporate activities of the second type are questions involving (a) the rights of shareholders to participate in the administration of the affairs of the corporation, in the division of profits and in the distribution of assets on dissolution, (b) the obligations owed by a majority shareholder to the corporation and minority shareholders, and (c) the liability of directors and officers to the corporation, its shareholders and its creditors. For the reasons stated above, these questions have also been decided, in the absence of statute, by the law of the state of incorporation[42] except in a very few instances where the corporation conducted most of its business in the state whose law was applied and maintained little, if any, contact with the state of its incorporation.[43] In short, corporations is another area where American rules of choice of law provide good predictability and uniformity of result.

Conclusion

American choice of law is not as unruly and chaotic as is generally supposed. On the basis of the actual court decisions, it appears that there is a fair measure of predictability and uniformity of result in all areas, except torts, contracts in situations where the contract does not contain a choice-of-law clause, and conveyances of interests in movables as between the parties to the conveyance. Conclusions that American choice of law provides for a system of *ad hoc* justice are based primarily upon the writings of certain authors and upon what some courts have said, primarily in the area of torts. There is, of course, the possibility that at some future time the new theories will engulf the entire field of choice of law. But up to the present time at least, these theories have been confined to restricted areas.

41. See e.g. State of Iowa ex rel Weede v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948).

42. *Restatement, Conflict of Laws Second* §§ 306, 309 (1971).

43. See e.g. Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir. 1959).

Book Reviews

CIVIL LAW

THE MEXICAN CIVIL CODE. Translated by Michael Gordon. (An Updated and Revised Version of the 1950 Translation by Otto Schoenrich). Dobbs Ferry, N.Y.: Oceana, 1980. Pp. 595.

*Reviewed by Dale B. Furnish**

Translation is an arduous task in the best of circumstances. The translator is not his own master revealing his own truth. If he is a good translator—and both Professor Gordon and Judge Schoenrich are—he must reveal another's truth through a new prism: a different language. When the translator turns his prism to the light of a Civil Code, several circumstances complicate the already arduous task.

The Civil Code of Mexico[1] stands as the center piece of the country's legal system. It is the touchstone for all other specialized codes and laws. It echoes through every aspect of Mexican law. It is the primary source for the "general legal principles" which control the rare civil controversy not contemplated specifically by a written norm. It is first among all sources of legal catechism in Mexico, as is the civil code in any civilian jurisdiction. It is probably the first code to which law students who will work all their professional lives in a codified system of law are exposed. Law students (and the entire profession into which they enter) come to it as *the* holy book of the law of Mexico, venerated in the same degree as is the Constitution in the U.S., perhaps more. Our Constitution is the essence of generality, a brief collection of aphorisms. The Mexican Civil Code contains general principles of transcendant importance, but does not neglect the mundane particulars of where and how one files a birth certificate, to cite one of a myriad of specifics from its 3074 articles.

Thus, while the Civil Code should be the first code translated, it is apt to try a translator's mettle more than any other. Terms which carry a concept back to Justinian for the initiated Mexican profes-

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1. The translation is of the Civil Code of the Federal District. Each state in Mexico has its own civil code, often with major differences from that of the Federal District. Beyond doubt, however, all state codes are based on that of the Federal District.

sional may have no satisfactory expression in the language of the Common Law, which has no civil code.[2] Any English term which might create the same warm sense of comfortable recognition and security a Mexican lawyer feels upon encountering *usufructuario* or *concurrencia* would inaccurately translate the Mexican terms. Therefore Gordon-Schoenrich correctly make the reader of English, steeped in the Common Law, confront uncomfortable translations like "usufructuary"[3] and "concurrence."[4]

I like this approach. It is better than making a free-flowing translation which would not discomfit a reader in English, but would mislead him as to the alien nature of Mexican law. The common lawyer will chafe as he reads this translation, but the chafing will be against the concepts and patterns of thought and approach native to the system being translated. The common lawyer will come up short against unfamiliar words in an apparently familiar context and ask, "Why didn't they just say 'holder of a beneficial interest' and 'bankruptcy'?" The response should be that to have done so would be to lull the common lawyer into a false sense of recognition and comprehension.

The translation does contain indefensible awkwardness at some points. For example, *fallecimiento* is translated "decease"[5] when it ought to be simply "death."[6] This mistake began with the 1950 version and was not corrected in 1980. Some whole articles suffer from tortured prose to no purpose. To take a short example, art. 36 is translated to read:

> The officials of the civil registry shall maintain in the special forms stipulated stipulated [sic] in "Books of the Civil Registry," the records referred to in the previous article.
>
> The inscription shall be in typewriting and in triplicate.

It should say:

> The officials of the Civil Registry shall maintain the records referred to in the previous article, utilizing the special forms stipulated in "Books of the Civil Registry."
>
> All inscriptions shall be typewritten and in triplicate.

These are isolated complaints against what is overall a sound and reliable translation, but they do show the problem of getting a fully satisfactory translation of such an extensive work.

While I endorse the translation style instigated by Schoenrich insofar as it serves the legitimate purpose of highlighting the special nature of Mexican law, and Gordon faithfully continues that style, I caution those who have the 1950 translation and its 1958 pocket part

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2. See Cook, *The American Codification Movement* (1981); Englard, "Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code," 65 *Calif. L. Rev.* 4 (1977).
3. Arts. 989-1037 *passim*.
4. Part Third, Title First.
5. Arts. 117, 120-22.
6. As it is in arts. 118-119.

not to throw that prior edition away. First, the 1950 edition contains an excellent short introduction by Judge Schoenrich which places the Mexican Civil Code in context and distinguishes it from other civil codes. Inexplicably, the 1980 version dropped this. In addition, the earlier edition had frequent references to other countries' codes or prior Mexican codes where they were the source for specific articles. Directly following the translation of the given article of the Mexican Code, these references serve both practitioner and academician who want to thoroughly research a specific provision. They might have been expanded for the second edition; instead they were cut out entirely.[7]

The Mexican Civil Code borrows extensively from European codes. However, it is also a vital expression of contemporary Mexican culture. For example, a proper wedding must include a civil ceremony (a separation of church and state not present in the United States), subject to a detailed list of formal requirements and documentation enforced by a judge who presides at the civil ceremony, often held just before the wedding festivities and at the same place, the better to gather parents and witnesses. A recent additional provision newly translated for this edition admonishes the august agent of the state's civil power that

> The celebration by the wedding party does not exempt the judge from strict compliance with the solemn requirements referred to in the previous articles.[8]

Another new provision cautions that birth records for a child born out of wedlock "shall not state that the delivery was of a legitimate son."[9] And it is a vigorous and optimistic code which makes the judge of the family court the arbitrator of the effect on "the morale of the family or its structure" of "whatever employment activity" a spouse may elect[10] and the arbitrator of what is most "conducive to managing the home, to the upbringing and education of the children and to the administration of the property appertaining thereto."[11]

On a more practical level, however, the most important addition to the 1980 edition is the translation of the extensive revision of the law pertaining to the Public Registry. Almost half of the more than 200 newly-translated articles are devoted to that revision.[12] This alone may justify the acquisition of the volume.

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7. The most complete record of the antecedents of the Mexican Civil Code is Batiza, *Las Fuentes del Código Civil de 1928* (1979).
8. Art. 103b.
9. Art. 60.
10. Art. 168.
11. Art. 169.
12. Arts. 2899-3074.

COMPARATIVE LAW

CONCILIATION AND ARBITRATION PROCEDURES IN LABOUR DISPUTES: A COMPARATIVE STUDY. Geneva: International Labour Office, 1980. Pp. 183.

*Reviewed by Leo Kanowitz**

The early twentieth century French union leader, Jean Jaurès, regarded the strike as a necessary but barbarous mode of struggle against society itself. To a somewhat lesser extent, the same might no doubt have been said about other forms of economic weapons employed in labor disputes, such as the slowdown or the boycott. While the *necessity* of employer weaponry, such as the lockout or the permanent replacement of economic strikers, is debatable, many employers apparently regard the availability of such weapons to be useful in ordering their relations with their employees and the latters' bargaining representatives, as evidenced by their frequent employment of such tactics, especially in the American industrial context. Be that as it may, the severity of these employer tactics and their subversion of the social contract are as clear as in the case of union weaponry, notwithstanding that the United States Supreme Court has legitimated, under many circumstances, resort to the lockout,[1] and the right of employers to hire *permanent* replacements for economic strikers.[2]

Whether resorted to by employees, unions, or employers, these tactics have much potential, often realized, of causing enormous social harm. Indeed, it is precisely because of their harm-causing po-

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1. American Shipbuilding Co. v. NLRB, 38 U.S. 300 (1965).

2. In NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938), the Court "held" that an employer could lawfully hire permanent replacements in the face of an economic strike, reasoning that the employer was not interfering with his employees' right to strike when it engaged in such conduct, since it had a right to keep its business operating during the strike. The court assumed that the promise of permanent employment to the strikers' replacements was necessary to induce them to join the employer's work force. The Court went on to hold, however, that the employer had violated § 8(a)(3) of the National Labor Relations Act by replacing only those strikers who had been active union leaders. This latter holding transformed the earlier language of the Court about the right to permanently replace economic strikers into true dictum. Subsequent cases have treated this dictum as established legal principle. See, e.g., NLRB v. Fire Resistor Corp., 373 U.S. 221 (1963); NLRB v. Fleetwood Trailer, 389 U.S. 375 (1967).

Although the Supreme Court decisions appear to regard the right of an employer to hire permanent replacements for economic strikers as a justifiable economic defensive measure by employers, there is no doubt that employees and their unions regard such an employer tactic as an offensive weapon. There is much justification for this perception—especially when one recognizes that the Mackay Radio doctrine permits employees to be deprived of their job rights simply because they have engaged in an activity, the strike, that is presumably protected by § 7 and 13 of the National Labor Relations Act.

tential that these tactics or "weapons"—strikes, slowdowns, boycotts, lockouts and replacement of strikers—are employed by the respective groups. While the harm caused to the immediate disputants by such activities is obvious, the injury to others is often overlooked. The families of strikers, of employers, and of customers and suppliers of the targeted enterprises are often severely affected. Depending on the scope and duration of the industrial dispute, much potential production is often irretrievably lost, diminishing the assets and resources of entire nations. The extent to which the prices of a nation's products are increased by disruptions in production resulting from industrial warfare also adversely affects its economic health, at least insofar as it competes for international markets against nations that are less prone to uncontrolled industrial conflict.

Recognition of these and similar consequences has led many countries to devise legal structures and mechanisms for the peaceful and orderly resolution of labor disputes. Chief among those devices have been conciliation and arbitration, a comparative study of which, as its title indicates, is the subject of this useful book published by the International Labour Office in Geneva.

"The study," according to the Preface to this volume, "attempts to cover the principal disputes settlement systems existing throughout the world."[3] Coverage of disputes settlement procedures in socialist countries is omitted, however, "since in those countries collective bargaining is viewed not as an adversary process but as a means of ensuring the full cooperation of management and workers in carrying out the economic and social plans and improving the management of undertakings."[4]

Events in Poland since 1980 suggest that omitting discussion of disputes settlement mechanisms in socialist countries would not be appropriate in future editions of this work. Whatever the validity of the stated rationale for the original omission, the activities of Solidarity, a 10-million-strong independent union, and of Rural Solidarity, a major union of agricultural workers in Poland, suggest that existing mechanisms in that country will have to be adapted, or new ones devised, to cope with the potentially destructive economic effects of work-employer strife, even if the employer happens to be the state itself. That the Polish events will stimulate similar activities in the surrounding socialist countries—Czechoslovakia, the D.D.R., Hungary, Romania, and even the Soviet Union itself—is, moreover, not at all unlikely.

In the light of such developments, which may not have been foreseeable when this book was written, it is somewhat unfortunate that the book does not contain a description of at least the existing mechanisms in the socialist countries that could be adapted to deal with such events if and when they do occur.

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3. P. v.
4. Id.

At first glance this comparative study of disputes settlement procedures around the world would appear to be long on information and exposition and short on creative analysis and criticism. A careful reading, however, reveals that, although its emphasis is on describing the various systems of conciliation and arbitration in the countries cited, it is rich in analysis and criticism as well.

The book's most important analytical contribution resides in its manner of classifying types of systems in different countries, finding common features and goals in the legislation and practices of countries whose economies, cultures, legal structures, and traditions are disparate.

In an introductory chapter, the subject of labor disputes and their settlement is treated in general terms. Here distinctions are drawn between individual and collective disputes, rights and interests disputes, and disputes concerning trade union rights. Procedures for resolving such disputes—e.g., adjudication, conciliation and mediation, arbitration, fact-finding and administrative determination—are defined, and distinctions drawn between procedures established by the parties or by government and those that are voluntary or compulsory.

A second chapter explores the relationship between disputes settlement procedures and a country's labor relations policy, convincingly demonstrating that neither of these areas can be rationally approached without reference to the other. This is followed by a chapter on the formulation and implementation of national policy regarding disputes settlement. This third chapter examines the ways in which employers' and workers' organizations have been associated in the making and implementation of policy in this area. It also describes in considerable detail the structure of national systems of disputes settlement.

Chapter four examines bipartite arrangements for preventing and settling disputes. It discusses collective bargaining as a method of settling disputes, and, what is perhaps more important, agreed arbitration and conciliation procedures. Developments in specific countries are described in detail, and public policies concerning agreed procedures are classified and analyzed. These include the absence of policy, legislative recognition, legislative prescription, and administrative action with respect to agreed procedures. This chapter concludes with a discussion of conciliation and arbitration machinery and of methods and problems in the selection and appointment of independent conciliators and arbitrators.

Governmental systems of conciliation are the subject of the fifth chapter. Here forms of conciliation are described and voluntary and compulsory conciliation contrasted. This chapter also examines the administrative framework for conciliation, factors affecting the development of administrative organizations for conciliation, and arrangements concerning individual conciliators and conciliation boards.

Chapters six and seven, which, except for a short chapter eight entitled, "Conclusion," are the book's final chapters, contain some most useful and important materials. Chapter six deals with the functioning of governmental systems of conciliation, and chapter seven with the subject of arbitration under governmental auspices. The conciliation chapter examines when a dispute is deemed to exist, how proceedings are initiated and conducted, conciliation in major disputes, fact-finding and preventive mediation. Government-sponsored arbitration, the subject of chapter seven, contrasts advisory-award and binding-award types of voluntary arbitration, discusses varieties of arbitration machinery, systems of compulsory arbitration of limited and general application, and, finally, procedural rules, fact-finding, decision-making and awards in arbitration.

Written succinctly and in a highly polished style, this book is a mine of useful information for labor lawyers, trade unionists and employers. It reveals that despite some minor differences reflecting distinct cultural traditions and variations in levels of industrial development, all countries share the common goal of avoiding the destructive effects of economic strife. While specific methods employed by one country to implement that goal are not necessarily appropriate for other countries, many may turn out upon close examination to be worthy and capable of emulation. The extensive footnotes in this volume enable those interested in pursuing such possibilities to delve more deeply into the workings, successes and failures of the national disputes-resolutions systems described in the book. Moreover, as indicated above, the book offers value judgments and guideposts for anyone who would embark on such a task.

As an official publication of the I.L.O.—an organization whose members include most of the countries of the world—this volume could not severely criticize any individual country's disputes resolution system, even if such criticism was warranted (a fact not in evidence). At the same time, the book is forthright in extolling the virtue of agreed procedures[5] for disputes resolution, while recognizing that in many countries, if arbitration is made compulsory, it will have a tendency to discourage collective bargaining and to replace other methods of regulating employer-employee relations.[6]

For American readers, the book has an additional impact. Familiar procedures and institutions on the U.S. labor scene—arbitration, conciliation, the role of the Federal Mediation and Conciliation Service, the National Labor Relations Board and the National Mediation Board (under the Railway Labor Act)—all take on new meaning when their diverse functions are compared and classified along with the functions of dispute-resolution bodies in other countries. Once again, in the tradition of de Tocqueville, Dickens, Trollope, and others, a new dimension is added to our own understanding of our

5. P. 55.
6. P. 161.

own institutions, practices, and laws, when we see them and ourselves as others see us.

DER LAIENRICHTER IM STRAFPROZESS. VIER EMPIRISCHE STUDIEN ZUR RECHTSVERGLEICHUNG. By Gerhard Casper & Hans Zeisel. Heidelberg, Karlsruhe: C.F. Müller, 1979. Pp. 185.

*Reviewed by Gunther Arzt**

These empirical studies on lay judges in the criminal process cover Germany (Federal Republic) by Casper/Zeisel, ch. 2; Austria by Frassine, Piska, Zeisel (ch. 3); Poland by Zawadzki & Kubicki (ch. 4) and the USA by Zeisel (ch. 5). Chapter 1 contains a brief introduction and puts the main results in comparative perspective. The German study by Casper & Zeisel was previously published in English in 1 *J. Leg. Stud.* 135 (1972); the chapter on the USA is an extremely condensed version of Zeisel's study on the American jury.

The articles are concise; the results are readily accessible because of the many graphs, and it would therefore be of little use to attempt a further condensation within this review. By bringing these four studies together in one volume, the editors answered implicitly in the negative the question whether the differences between the American jury system, the Austrian and German "Schöffen"-system and the participation of lay judges in a Socialist country such as Poland are too fundamental for meaningful comparisons. I agree. Poland differs from the other three countries by its tendency towards "professional" lay judges. This professionalisation is achieved by the selection process (p. 127) and by participation of the lay judges in *all* cases tried before the court for a fairly long period (as p. 127 indicates, for four years, not two years as on p. 10). 30% of these laypersons serve more than one term and there exists even a specific journal for lay judges. And yet these lay judges serve functions comparable to those in "capitalist" countries and encounter similar prejudices: In Poland 25% of the (professional) judges, 33% of the prosecutors and 30% of the defense attorneys are against this lay participation (p. 137, 139, 140). The influence of the lay element is considerably greater in Poland than in Austria or Germany. One would expect that the explanation lies in the higher degree of professionalization of the Polish lay judges, but this assumption is somewhat shaken by the observation that "the longer the lay judge holds his office the more rarely he influences the outcome" (p. 154).

In all these studies the influence of the laymen is measured by the degree of disagreement between professional and lay judges. In-

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itial disagreements are pursued in order to find out who yields to whom and whose view prevails in the end. It seems to me that there is a fundamental difference between the "real" influence (p. 12—or the "success"of the viewpoint of the lay judges, p. 16) and the "proven" influence (p. 16).[1] To equate influence "proven" by disagreements with "real" influence assumes—if carried to the extreme—that none of the members of a panel which arrives at a unanimous conclusion influences the decision: if a court has four members, two professionals and two laymen, and 100% of the cases are decided unanimously, Casper & Zeisel assume that the real influence of the lay judges is zero. This assumption rests on no empirical evidence whatsoever. Statistically it would be equally correct to assume that the influence of the professionals is zero. The "real" influence of the four members of the court (in this example) will be somewhere between these extremes. It may be unreasonable to attribute to each member an equal share. To assume, however, that in unanimous decisions the influence of lay judges is zero *must* lead to the conclusion that their "real" influence (as defined by differences of opinion between lay and professional judges) is extremely low, simply because such differences are relatively rare.[2] This in turn leads to a dramatic underestimation of the "real" influence of the lay element in the criminal process.

If these limitations are kept in mind, the concentration on the causes of disagreements is well justified and yields a wealth of interesting information. The reader constantly wants to know more. If e.g. the analysis of disagreements distinguishes between the issues of guilt and of sentencing, it would be valuable to know to what extent these issues influence each other. If the lay judge thinks the defendant is innocent but the majority holds him guilty, the temptation to plead for a mild sentence is great (though theoretically unjustified since the issues have to be considered separately). It is a pity that such interrelationships between these two issues have not been pursued in more detail in the Austrian or German study because of the low number of such cases (p. 118). Nor is it apparently a peculiarity of the lay judges to transfer disagreements from the issue of guilt to the issue of sentencing (see p. 46, 50/1 where the continuing disagreement originates from the professional judges).

The wish that these studies had been broader is, of course, simply an expression of the conviction that we can learn more about the criminal process from an ounce of these empirical studies than from a pound of theories on judicial decision-making.

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1. "Tatsächlicher" bzw. "nachweisbarer" Einfluss.
2. The Polish study remarks correctly that the lay judge can play a "positive role" even in cases where he accepts the professionals' decision (p. 155).

CONSTITUTIONAL LAW

CONSTITUTIONALISM IN ASIA. ASIAN VIEWS OF THE AMERICAN INFLUENCE. Ed. by Lawrence Ward Beer, Berkeley, Los Angeles, London: University of California Press, 1979. Pp. x, 210.

*Reviewed by Edward McWhinney**

This slim volume of essays on the constitutional systems of Bangladesh, China (Taiwan), India, Indonesia, Japan, Malaysia, The Philippines and Singapore stems from a series of public lectures and seminars organized by the Committee on Asian Law of the Association for Asian Studies of the United States in 1976 as part of the American Bicentennial celebrations. The individual authors are all drawn from the countries covered in the survey, and they were each asked to address themselves to the subject of American constitutional influences on the formation and subsequent growth and development of their own national systems. All of the authors are distinguished in their own countries—whether as Supreme Court Justice or law professor; but the experience is quite diverse, as is the degree and depth of exposure to American legal training and legal ideas, some of the authors having spent an academic year in graduate legal studies in the U.S. and others appearing to have made, at best, only fleeting visits, here and there. Beyond that, only some of the countries selected for survey would normally be considered, by comparative constitutional lawyers, as having been subjected to any "reception" of American law. The result is a collection of somewhat disparate essays that differ markedly in the length and thoroughness of treatment of American legal sources and borrowings, and in respect to which, indeed, the key question posed as to an American "connection" may vary from being of major importance to one that is largely irrelevant in legal terms.

Perhaps the most successful essay, in this respect, is Professor Tripathi's study of the Constitution of India. Professor Tripathi happens to know both the American and the Indian constitutional systems very well—the pre-condition to useful ventures in comparative legal science. He is also fortunate in that the Indian Constitution of 1950 was designed, from the outset, as a federal system, and both the Founding Fathers in the original Indian constituent assembly and also subsequent benches of the Indian Supreme Court drew heavily upon other federal systems, Commonwealth and American, with the Supreme Court continuing to make frequent citation and discussion of U.S. Supreme Court decisions in its own opinions. Professor Tripathi emerges from all this as something of an advocate of judicial self-restraint, and while the empirical evidence he

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marshals in support of his argument—the *Golak Nath* decision of 1967 followed by the *Kesavananda Bharati* decision of 1973; and the *Shivkant Shukla* decision of 1976 and its political (electoral) follow-up—is persuasive, one may wonder if this intellectual position does not in fact owe less to Thayer, Frankfurter, and Bickel than to residual "British" constitutional notions preaching the sovereignty of Parliamentary majorities *vis-a-vis* the courts. The other, "received" British element in Indian constitutional experience is not canvassed in any depth, presumably because of the deliberately bilateral, Indian and *American*, focus that is by definition given to the essay; but something may be lost by that omission, including a useful bridge to other Asian systems treated in the volume—Bangladesh, Malaysia, and Singapore—that have very many British constitutional roots but no very obvious American ones.

The essay by Professor Ukai on Japanese constitutionalism is intellectually nuanced and sensitive, but all too brief either for a proper identification and appraisal of the respective "received" German and American, and also indigenous Japanese, influences, or for a systematic analysis of the direct borrowings from American Supreme Court jurisprudence in the post-war Japanese Supreme Court decisions, about which a good deal is available, anyway, in English-language publication (including valuable work by the editor of the current volume, Professor Beer). While in some of the cases at least—Bangladesh and Indonesia, for example—the experience under the present constitutions is still too limited in time to enable significant testing of the positive law, as drafted, by the empirical experience of law-in-action, other studies—The Philippines, for example—would, like those on India and Japan already mentioned, have gained by being liberated from a too restrictive focus upon American constitutional influences to the exclusion of other, non-indigenous roots (Spanish, British, or German as the case may be). This might have permitted testing some interesting hypotheses on the more classical theories of the ethnocentricity (or Western-based particularism) of constitutionalism, as opposed to more contemporary thinking which insists, rightly I think, upon its claims to universalism.

CONSUMER PROTECTION

REGULATING BUSINESS: LAW AND CONSUMER AGENCIES. By Ross Cranston, London: Macmillan, 1979. Pp. 186.

*Reviewed by Peter Reuter**

This is a study of the behavior of consumer protection agencies in England. Its main interest for American readers is the revelation, once again, of the relative innocence of English institutions of law enforcement. What is perceived in this country as a major issue of institutional and class conflict is seen in England as primarily a problem of dispute resolution in which the good faith of the two parties, seller and customer, is rarely in question.

Cranston has gathered data from many sources. He reviewed 1,000 case files, interviewed 220 complainants, carried out participant observation work in three agencies and interviewed a number of businessmen. The data all suggest that consumer protection is regarded as a low priority issue, with customers serviced by agencies which, Cranston asserts, believe "that prosecution in many cases would be nothing more than a punitive response to wrongdoing, because businesses are basically law-abiding and simply need to be informed or reminded of their legal obligations" (p. 169). The lack of an effective consumer movement in Great Britain, a matter to which Cranston gives little emphasis, also helps ensure the low visiblity of consumer agency activities.

In Britain consumer protection agencies are units of local government, a far weaker, though less corrupt, level of government than in the U.S. It is clear from Cranston's description that the agency staffs view themselves as having considerable political autonomy. For example, each agency is responsible to a local committee, external to it, which has the right to veto prosecutions recommended by the agency. In the three agencies which Cranston studied intensively, the staff presents the chairman of the committee with a description of the acts leading to the prosecution recommendation, but with the name of the offending firm omitted; the chairman has never reversed the agency decision.

It is striking how little use is made of prosecutions and how little comes of them. On the latter point the figures are particularly clear. In the first six years following the passage of the major consumer bill, the Trade Descriptions Act 1968, there have only been seven prison sentences and six of these were suspended. Fines have averaged only $180 per offense and have totalled less than $250,000 per annum. Enforcement agents believe, and the above

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figures surely support that belief, that courts will not provide them with effective sanctions.

Who in fact does get prosecuted? Cranston provides an interesting and depressing analysis of the perceived trade-offs of consumer agencies. Small businesses make attractive targets because they are thought, correctly, to be unable or unwilling to invest much in defense against the charges. Large businesses of course provide more difficult targets and agencies are generally less willing to prosecute them, though they recognize that such businesses may well determine the prevailing ethics in a particular sector. Cranston's survey of actual prosecutions bears out the obvious implications of this analysis: agencies tend to prosecute smaller businesses. And it is almost a matter of ritual to add that no effort is made to test the efficacy of alternative prosecution policies. Indeed, Cranston's references suggest that there is little published analysis of any aspect of consumer protection policies in Britain.

The agencies examined here evolved out of the traditional weights and measures departments. The transition is recent enough, the 1968 Trade Descriptions Act being the critical legislation, that consumer agencies still reflect the orientation of their predecessors. For example Cranston notes that the agencies still pay a great deal of attention to possible watering of milk, though milk is less important in the household budget and the decline of small dairies has reduced the variability of quality control. Perhaps the most important consequences of their origin is that the officers of these agencies correctly perceive themselves as members of a low-status occupation. Aggressive enforcement and an enthusiasm for acquiring public prominence through spectacular prosecutions are noticeably absent from Cranston's description of the policies and goals of these agencies and their members.

This book is the revision of a dissertation and, unfortunately, it shows. The presentation has all the defensive ponderousness that traditionally characterizes theses. "The setting of consumer agencies structures the way they operate and in particular how they exercise their discretion" (p. 108). This is an example of a class of statements which strikes the non-sociologist as simultaneously uninformative and anesthetizing. The final chapter is particularly replete with them. Cranston has done a competent job in creating and presenting a consistent and convincing set of data on the performance of consumer agencies in Great Britain but the reader must exercise his own imagination in interpreting the results.

HUMAN RIGHTS

NON-MUSULMANS EN PAYS D'ISLAM: CAS DE L'EGYPTE. By Sami Awad Aldeeb Abu-Sahleih. Suisse: Éditions Universitaires Fribourg, 1979. Pp. 405.

*Reviewed by Farhat J. Ziadeh**

This important work could not have appeared at a better time. The difficulties that have arisen in recent months between the Muslim majority and the Coptic Christian minority in Egypt and the attempts of the late President Sadat to deal with them have been propagated by the news media throughout the world. These difficulties, intensified in recent months by many factors which gave rise to fanaticism on both sides, are not of recent origin, for they go back to the Muslim conquest of Christian Egypt in the middle of the seventh century. The relationships between the two groups have been uneasy through the centuries and at times violent, but the rise of secular nationalism in modern times seemed to lessen the differences between the two groups until the bloody riots in Cairo of late indicated a contrary course. The book under review treats this important topic in the main, but it deals with the relationship of the state to other non-Muslim minorities as well.

Like many dissertations produced on the European continent (the book is basically a dissertation at the University of Fribourg) it is very thorough. This thoroughness dictates the inclusion of material that bears some, but not a vital relationship to the subject discussed. Following this tradition the book begins by devoting a subpart (some thirty pages) to the transition from a religious system to a secular system in Europe starting with the Greco-Roman period and ending with the rise of the modern nation-states. A more pertinent and larger sub-part describes the transition to a quasi-secular system in the countries of Islam, but not before describing the juridical relationships among groups from pre-Islamic times, down through the various Islamic empires, and ending with the juridical status of non-Muslims following the demise of the caliphate and the rise of the modern nation-state of Turkey.

Part Two of the book is devoted to the main subject, namely the religio-juridical order in Egypt and its future. Sub-parts deal with the confessional character of the judicial order, with the impact of religion on the conflict of laws and jurisdiction, and with the impact of religion on juridical status. All these sub-parts are divided into chapters that take up individual problems of ideology, conflict of laws, and status in a very logical and orderly fashion. A final section, which is in lieu of a conclusion, deals with the future of the ju-

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ridical order in Egypt in light of United Nations documents pertaining to the rights of man. Eight appendices consisting of documents, seven of which have not been published before, are included in the book. These documents involve in the main protests by Copts against policies followed by the state which they considered suppressive of their rights.

From the point of view of the rights of man recognized by the United Nations, the author has found that the juridical order in Egypt relative to the rights of minorities is wanting. He attributes the inequality of non-Muslims to the constitutional provision that Islam is the religion of the state and to the several discriminatory legal doctrines that flow from such a provision. Examples of such doctrines are: the application of Islamic law in all matters of inheritance to the exclusion of the laws of the minority communities, including the Copts; the application of Islamic law to the marriage of Christian spouses if they should differ in community *or* confession; the ease with which non-Muslims can convert to Islam (e.g. if a Christian man should say at the time of his marriage to a Muslim woman that there were no impediments to the marriage, such a declaration would amount to his conversion to Islam) as compared to the great impediments placed before the convert from Islam (e.g. he/she cannot contract a marriage and cannot inherit property from anyone because he/she is legally dead); the fact that a change from one non-Muslim denomination to another during a court proceeding would not entail a change in the original law applicable to a personal-status dispute, but a change from a non-Muslim denomination to Islam would entail the application of Muslim law which allows polygamy and easy divorce, etc.

The problem with using the United Nations documents on the rights of man as an absolute touchstone in judging doctrines of Islamic law that developed in the eighth and ninth centuries is that such a procedure violates a cardinal principle of historical writing which insists that an institution be judged by the ideas and canons obtaining at the time of its creation. If one were to add that Islamic law is believed by Muslims to be the eternal will of God, the dimensions of the problem become more evident. This is not to condone discrimination, but to understand the difficulties reformers face in effecting change toward secularism and absolute equality.

One other observation is that the general tone of the book lacks empathy with Islamic beliefs and doctrines. It is not fair to equate the Muslim belief that unbelievers are ritually unclean with the abhorrence that Muslims harbor toward pigs (p. 51); after all, Muslim men are allowed by Islamic law to marry Christian and Jewish women. It is also unfair to liken Islam to a prison which is easy to enter but from which it is impossible to exit (p. 61). It is further libelous to accuse the late President Sadat of deliberately placing a dark spot on his forehead to delude the people into thinking that he always performed his prayers, so as to keep them calm (p. 123) (fre-

quent prayers that necessitate touching the ground with one's forehead often cause calluses to form on the forehead).

Despite these criticisms the book can be of immense value to students and scholars interested in modern Egypt and even to lawyers whose practice might entail research in personal status laws in Muslim countries.

SOVIET LAW

SOVIET LAW AFTER STALIN, PART III, SOVIET INSTITUTIONS AND THE ADMINISTRATION OF LAW. Donald D. Barry, F. J. M. Feldbrugge, George Ginsburgs and Peter Maggs (eds.). Alphen aan den Rijn: Sijthoff & Noordhoof, 1979. Pp. xiv + 414.

*Reviewed by Ivo Lapenna**

This is the third and final part of a three-volume publication on the development of Soviet law since the death of Stalin in 1953. The first volume, published in 1978, dealt mainly with the citizen and the state in contemporary Soviet law; the second volume (1979), with social engineering through law. The third by and large concentrates on the people and institutions which are primarily involved in making Soviet law work. Only now, after the publication of the third volume, has it become possible to assess the value of this important work of almost 900 pages, and to see to what extent the editors and some fifty authors—who contributed precisely forty studies, articles and shorter items to the three volumes—were able to materialize their original plan. Therefore, first of all a few words about the project itself.

Five years of extensive research has been conducted by a group of scholars and other specialists from the United States, Canada and some European countries under a grant from the Ford Foundation. (Some authors received separate additional grants from various sources.) There were several meetings of the participants in the project. The first took place in New York in November 1975, when the authors discussed the contents of the work and tried to find a common approach for their individual analyses of various aspects of contemporary Soviet law. The main achievement of the conference was a common "Framework for Analysis" which was published in the first volume as Appendix I. The authors rightly pointed out that the tension between legality and arbitrariness is a characteristic that has been noted by many students of Soviet law. In applying this duality to their individual contributions they agreed to use the terms "the normative" and "the prerogative" spheres of Soviet law, the first being the sphere in which legal norms apply in an even-

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handed and consistent way to all citizens and at all times, the second being the sphere which involves the usurpation of law-application in areas broadly defined as "political." The latter can be done in many ways, especially by simply ignoring or by-passing the law in force, by intentionally loosely-defined rules of law which facilitate arbitrariness, and by abrupt, undiscussed or unannounced change in application of norms (I, 299). In a review of the first volume written for another periodical, the present reviewer made a few remarks about the use of the terms "normative" and the euphemistic "prerogative," instead of the well-established "legality" and "arbitrariness," when dealing with Soviet law (or with any other legal system), but he also added that the authors' decision must be respected and the meaning of the two expressions as defined in the "Framework for Analysis" must be taken into account when reading their contributions. This of course relates also to the third volume. However, as the general editor, Professor Feldbrugge, states in his Epilog to the contents of all three volumes, "in many of the studies of the project, the underlying dilemma of Soviet law has been defined as one between *legality* and *arbitrariness*" (p. 404, emphasis supplied), which shows that the respective authors themselves regarded these two expressions as more adequate for defining the fundamental dilemma of Soviet law.

The third conference, aimed at coordinating the contents of Vol. III, was held in the historic building of the Faculty of Law of the University of Leyden. The meeting was attended by the members of the original research group and a number of well known European specialists in the field of Soviet and East European law, some of whom contributed co-reports which have been incorporated in the present volume. This conference coincided with the 25th anniversary of the Documentation Office for East European Law of the University of Leyden, Faculty of Law, founded by the late Professor Z. Szirmai, now under the directorship of Professor Feldbrugge, at the same time General Editor of the prestigious series "Law in Eastern Europe." All interested in Soviet, East European and comparative law will certainly agree that this is a convenient moment to express sincere congratulations to the Documentation Office for its remarkable achievements in studying and analyzing Soviet and East European law, and to the publishers for their numerous outstanding publications in the series, one of which is the present volume (No. 20-III of the Series).

After the publication of the last part it seems useful to repeat that the three-volume work is neither an encylopaedia of Soviet law, nor was it intended to be a simple collection of individual papers on various topics written by a number of writers with different approaches, but a planned work as a result of individual and joint efforts of many authors with a coordinated general approach. This is the way in which such collective works should be written and edited, but it does not mean that the editors have fully succeeded in

carrying out this difficult task and harmonizing all contributions, including those in Volume III.

The contributions to the book under review can be divided into several groups. First of all there are two relatively short but very good articles on Soviet administrative procedure. Donald Barry deals especially with the scope of administrative procedure, the adoption of normative acts by administrative organs and handling of individual cases, while Uibopuu discusses, among other things, the impermissibility of appeals from administrative acts, and administrative discretion and arbitrariness. As distinct from Czechoslovakia, Yugoslavia, Hungary, Poland and Bulgaria, which adopted general laws on administrative procedure between 1955 and 1970, the USSR still does not have such a general law, but the procedural rules are contained in various enactments relating to specific administrative sectors, such as application of administrative fines, administrative commissions of local soviets, procedure for considering proposals, applications and complaints of citizens, and others. The non-existence of a general law on administrative procedure creates uncertainty and facilitates arbitrariness. In principle, the Hungarian professor P. Schmidt, quoted by Barry on p.19, is right in saying that "the necessity for an [administrative] procedural law arises when the state needs to politically and legally guarantee the right of citizens," but it is also true that even the existence of such laws did not and does not prevent authorities in the above mentioned countries, especially in Czechoslovakia and Bulgaria, from consciously violating legality in the field of administrative procedure.

Ginsburgs gives a clear analysis of the reform of Soviet military justice in the period 1953-1958, to which until now little attention has been paid in Western literature. On the other hand, Beerman in his short contribution considers the question of the necessity of military courts in general. In a lucid, almost literary style, he presents in detail two characteristic cases. In the first, an advocate successfully pleaded before the military courts of Imperial Russia and saved his client's life in spite of the explicit wishes of the Tsar. In the second case—that of the smugglers and speculators Rokotov and Faibishenko, at the time widely reported in the USSR and in the West,—after the commission of the offense the punishment for speculation on a large scale was increased first to 15 years imprisonment and later to the death penalty, allegedly at the explicit request of Kruschev, who wanted capital punishment for the defendants. In glaring violation of the rule of Soviet law prohibiting retroactivity to the detriment of the perpetrator (art. 6 of the RSFSR Criminal Code), the defendants were eventually sentenced to death and executed.

The next group consists of three contributions on criminal law, criminal procedure and criminology. A well documented study by Juriler examines recent trends in Soviet criminal justice and to some extent completes his *Revolutionary Law and Order*, one of the best books in this branch of Soviet law. His article is followed by a short paper of only three pages in which Schroeder emphasizes

the important trend towards the "individualisation" or differentiation of punishment in Soviet criminal justice. G. B. Smith's article on procuratorial campaigns against crime, although published in another part of the book, in fact belongs to this group. It deals with campaigns organized by the procuracy against illegal imposition of fines, hooliganism and economic violations (theft or improper maintenance of state property, substandard production, altering accounting records and the like). Illustrated by many examples, statistical figures and tables, Smith's study elucidates one of the many aspects of procuratorial activities in the USSR.

The fourth group consists of an article by Maggs on "The Characteristics of Soviet Tax and Budgetary Law" and another by Loeber "On the Status of the CPSU and Higher State Agencies in Soviet Financial Law." Both authors expound very clearly the functioning of Soviet law in this field. Maggs points out that the system "is extremely effective in collecting taxes due under the law," practically without litigation and "without creating a widespread perception of unfairness." Of course it cannot be otherwise in a system where the majority of taxes is collected by the state from its state enterprises or deducted from the salaries and wages of its employees and workers.

Pomorski's study and Polsky's comments on the administration of so-called "socialist" property in the USSR (i.e. state, *kolkhoz*-cooperative and property owned by the so-called "social organisations") form a separate, fifth group. Pomorski examines the new trends and institutions in the fundamental areas of Soviet economy: industry with its new production associations (*ob'edineniia*), scientific-research investigations and scientific-production associations, agriculture and inter-farm cooperation. In his short comments, based on personal experience and therefore exceptionally valuable, Polsky completes Pomorski's article with a number of telling examples and shows how the new institutions operate in practice.

Three substantial studies and one shorter article in the form of observations relate to three occupations of the Soviet legal profession and to ZAGS (Civil Registration Offices). Luryi presents the history and the actual position of the Soviet jurisconsult; Zile analyzes the work, size and distribution of the *Advokatura*, and Butler examines its situation and prospects; finally, Hazard gives a fair account, supported by many examples, of the role and functioning of the two "humble guardians of routines": notaries and ZAGS.

Although Soviet trade unions are often mentioned in the Western press--and there are also several reports and statements published by the ILO (1927, 1960, the last in March 1981)—their origins, structure, juridical position and functioning are still little known. Osakwe's long article of more than fifty pages with almost 200 footnotes fills the gap, but unfortunately only to some extent, because the author relied too much on official statements of the leadership of Soviet trade unions and on the prevailing Soviet doctrine, as indeed he admits (pp. 307, 308). The arrest and inhuman treatment of those

who wanted to organize free trade unions in the USSR and the recent events in Poland show the true nature of trade unions as transmission belts of the Party in all countries with a Soviet type government.

The last group consists of two remarkable contributions: one, almost a monograph, by Sharlet on the overall role of the Communist Party in the administration of justice; the other, a much shorter article, by Meisner on the relationship of the CP to the Ministry of Justice. In Sharlet's contribution the emphasis is on criminal justice, and in this respect it is closely related also to the group of articles on criminal law and procedure. He analyzes three aspects of Party control: in theory, from theory to practice, and in practice. He clearly distinguishes between Party supervision of and Party interference in the administration of criminal justice, and illustrates the two main aspects with many striking examples and cases reported in the Soviet press and periodicals. His survey of the methods applied by the Party in controlling the judiciary is followed by Meisner's article on the Ministry of Justice from the decentralization under Kruschev in 1956 to the recentralization in 1970, and on the role it plays at present in the administration of justice under the control of the Party.

In an excellent Epilog under the title "Does Soviet Law Make Sense?—Rationality and Functionality in Soviety Law," by itself a model short study worthy of careful reading, Feldbrugge briefly evaluates the three-volume work as a whole and makes an attempt at generalization with explicit references to individual contributions. His most essential point is that the structure of legal-economic relationships within Soviet society was completed in the early 1930s, and that "anything that happened afterwards can be (but need not be) described as variations on the same theme" (p. 400). Alluding to Lenin and *mutatis mutandis*, perhaps it would be more appropriate to say that practically everything that happened in Soviet law after the death of Stalin can be described as one step forward and one, in some areas even two or more, steps back.

Soviet law has always been and remains a docile servant of the ruling Party elite, never a master over the masters. And this elite, deceivingly calling itself the "dictatorship of the proletariat" before the Party Programme of 1961, and equally deceivingly claiming to represent the "entire Soviet people" afterwards, "is not bound by any laws" (Lenin) or, as Vyshinsky said in 1938, "the tasks of strangling" cannot be carried out "by the direct blows of administrative repression alone, but through legal means as well, with the assistance of the courts."

As in the previous two volumes, by and large the facts in the descriptive sections of this book are correctly stated, and the legal analyses, with a few exceptions, adequate. The contributions are well written, in clear language easily understandable even for those without legal education, but especially for all persons already familiar with the Soviet system. Of course not all articles, observations

and comments are at the same level of strict academic standards, and it could hardly be otherwise in a collective work of such dimensions and character.

With sincere praise for the opus as a whole, and with all esteem for the editors and contributors to the three volumes, the reviewer feels that at least a few general remarks are necessary.

(1) The terminology throughout the three volumes has not been completely coordinated. For instance, in this volume the Russian term *advokat* has been translated as *attorney* on p. 396, and as *advocate* elsewhere in the book. The Russian *rayon* appears as *county* on pp. 247, 267 and elsewhere, but as *district* on pp. 64, 100, 101 etc. The Russian *oblast'* appears as *province* on p. 65, as *region* on p. 100, but on p. 247 both *oblast'* and *krai* are called *provinces*. Such and similar terminological inconsistencies can cause confusion, especially in texts on legal matters, and even mislead readers lacking previous knowledge of Soviet law. The error on p. 53, to mention just one example, is most probably due to such terminological differences: the two defendants were not and could not be tried "in the District Court of Moscow" (people's district courts are the lowest degree courts in the Soviet system of ordinary courts), but by the City Court of Moscow (belonging to the group of second degree courts which have jurisdiction in all important matters) in the first instance, and by the Supreme Court of the RSFSR in the second instance. A uniform terminology is badly needed. Perhaps the Leyden Documentation Office might consider publication of a good Russian-English Dictionary of Legal Terms.

(2) A number of authors attach too much importance to the letter of the new Soviet Constitution of 1977 (for instance on pp. 51, 59, 67, 230, 394). As a matter of fact, the Party, whether mentioned in the Constitution or not, has always been and remains the decisive force in Soviet society behind the state façade. The Yugoslav Constitution of 1946 did not mention the Party at all, and yet, at that time, the Yugoslav Party played precisely the same role as the CP of the USSR. In other places the respective authors are more realistic (e.g. pp. 69, 126, etc.): Polsky went so far as to assert that art. 12 of the Soviet Constitution "is a bluff, an absolute fiction" (p. 141).

(3) Broadly speaking the complete work covers developments in all major areas of Soviet law during the last two-and-a-half decades; however, it is not arranged in accordance with the main branches into which Soviet law (and other legal systems) is usually divided (constitutional or state, administrative, criminal, civil etc.) and individual contributions or sections on the same branch of law can be found in any of the three volumes. In fact, whatever the original intention of the editors and authors, the work is an organised collection of studies, articles and shorter items rather than a systematic exposition of the Soviet legal system as a whole. Therefore, although each volume has its own Index, a comprehensive cumulative Index (separately for persons and subjects) in an additional

small volume would greatly assist readers and considerably increase the usefulness of this study. It could be done even at this late stage.

(4) Everywhere in the three volumes the USSR and its law are called "socialist" without reservations. Some of the authors even seem to believe that the epithet "socialist" is appropriate for the Soviet state, Soviet law, Soviet state property, Soviet society in general. "Socialist" in such contexts, precisely as similar terms in the Soviet political-legal language in others (e.g. "dictatorship of the proletariat," "democratic centralism" "peaceful co-existence," "proletarian" or "Socialist internationalism" "fraternal help," etc.) are far-reaching weapons in the so-called "ideological struggle," openly utilized by the Soviet elite for spreading and consolidating its power. Words, even when completely deprived of their original meaning, have a tremendous strength and can be dangerously misleading for readers not familiar with Soviet society, and for all those who are inclined to believe empty slogans rather than to acquaint themselves with facts.

Many political scientists and legal scholars, including the present reviewer, long ago characterized the Soviet system as a unique form of totalitarian state capitalism without precedent in history. In the early fifties the Yugoslav Party leaders came essentially to the same conclusion. Djilas, one of the prominent leaders of the anti-nazi revolutionary resistance in Yugoslavia and one of the closest associates of Tito during the war and for a few years afterwards, called the Soviet internal system "industrial feudalism—in which everyone from doorman to chairman is at the giving or receiving end of some binding trust or obligation," in a relationship that existed "in feudal society between vassals and their superiors. . . ." He compared "Soviet imperialism in the last fifteen years or so" with the Ottoman-Turkish imperialism in the 16th and 17th centuries which tolerated "millets" of its own, i.e. "dependent territories enjoying varying degrees of cultural and national autonomy," but excluding "the right to independence or political agitation against the prevailing system" (*Encounter*, London, December 1979).

Michel Heller, quoted by Feldbrugge on p. 406, has demonstrated that the first concentration camps were established a few months after the October Revolution, and that "labor became forced labor, an instrument of discipline for the entire population, and of punishment and extermination for millions." Feldbrugge also quotes Alain Besançon who asked "why the Soviet regime does not abandon its ideological claims and transform itself from a USSR into an All-Russian Police and Military Empire?", as well as the opinion of numerous dissidents who pointed out that "the most indigestible aspect of Soviet life is. . .the necessity to live with the omnipresent lie." One cannot but agree with Feldbrugge's answer: "Abandonment of ideology would eliminate this necessity" (p.405), but at the same time it would eliminate justification for the system itself. Thus, the omnipresent lie persists.

If so, why then call this system "socialist"? Why, in addition to

the inaccuracy of the description and its misleading consequences, offend all those in the USSR, in its "millets" and in the West, who believe that socialism with a human face is possible, and that there is no socialism without democracy? Perhaps in order not to offend the Soviet elite at the time of a peculiar kind of *détente* characterized by concessions without reciprocity? Whatever the reasons, it would be much better to use the neutral term "Soviet" whenever necessary for the Soviet state, Soviet law, Soviet legal system, even for derivatives such as Sovietism and Sovietist, in any case more accurate than "socialism" and "socialist."

FOREIGN LAW IN ENGLISH

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This is a listing of works on foreign and comparative law printed in the English language. It embraces books published up to the end of 1980 and articles published in 1979 not previously listed.

Earlier listings on foreign and comparative law in English appear in *A Bibliography on Foreign and Comparative Law*, by Charles Szladits, published by Oceana Publications, Inc., Dobbs Ferry, N.Y. (Vol. 1, 1955; Vol. 2, 1962; Vol. 3, 1968; Vol. 4, 1975; Vol. 5, 1980, with annual supplements).

The list below is a selected one; a more complete listing will appear in the corresponding annual supplement of Szladits, *A Bibliography on Foreign and Comparative Law* (supra). The list below contains only one entry for each publication; for example, translations of foreign laws will all be found in Part II, number 6, and not under the appropriate subject headings (such as Commercial Law, Constitutional Law, etc.).

I. ON COMPARATIVE LAW AND RELATED SUBJECTS

1. COMPARATIVE LAW IN GENERAL

BOOKS:

The International Contract. Law & Finances Review. Ed. John G. Goldsworth. Seminar Services S.A. Lausanne, Switzerland. Vol. 1 —, 1980 —, six issues yearly.

International Encyclopedia of Comparative Law. Tübingen, 1971 —. Issues distributed in 1980 (summer):

Vol. 1. National reports C; Vol. 9. Commercial transactions and institutions. Chapter 5. Letters of credit; Vol. 11. Torts. Chapter 2. Liability for one's own act; Vol. 17. State and economy. Chapter 11. Legal consequences of state regulation.

The individual issues are listed under the authors' name.

International Encyclopedia of Comparative law. Issues published in 1980 (distributed June 1981):

Volume III. Private International Law. Chapter 31. Torts — Introduction (A.A. Ehrenzweig and Stig Strömholm). 7 p.; Chapter 32. Enterprise liability (A.A. Ehrenzweig). 46 p.; Chapter 33. Intentional torts (Stig Strömholm). 23p.; Chapter 34. Unfair competition (Alois Troller). 17 p.; Volume IV. Persons and family. Chapter 4. Interspousal relations (Max Rheinstein and Mary Ann Glendon). 194 p. Volume VIII. Specific conracts. Chapter 8. Contracts for work on goods and building contracts (Werner Lorenz). 148 p.

Schlesinger, R.B.: Comparative law. Cases — text — materials. 4th ed. Mineola, N.Y., 1980. 900 p. (University Casebook Series.)

Schmidt, Folke: The need for a multiaxial method of comparative law. In: Festschrift für Konrad Zweigert. Tübingen, 1981. p. 525-536.

ARTICLES:

von Mehren, A.T.: A significant contribution to the literature of comparative law. [Book review of *An Introduction to Comparative Law* by K. Zweigert and H. Kötz.] Mich. L. Rev. 77:347-49, '79.

2. ACADEMIES, CONGRESSES AND INSTITUTES

BOOKS:

ARTICLES:

3. BIBLIOGRAPHIES AND COMPUTERIZATION OF LAW; LIBRARIES

BOOKS:

Bing, Jon & Harvold, Trygve: Legal decisions and information systems. Oslo, 1977. 272 p.

Index to Commonwealth legal periodicals. Comp. & Ed. Christian L. Wiktor. Halifax (Dalhousie Law School Library, 1979 — (1980), vol. 6. [Continues Current Index to Commonwealth Legal Periodicals vol. 1-5, 1974-1979.] Indexes over 165 legal periodicals from Commonwealth countries.

Max-Planck-Institut für Ausländisches und Internationales Privatrecht. Bibliography of articles on comparative law, unification of private law, and on private international law. A bibliography of the year 1979. Hamburg, 1980. 464 p.

Organisation for Economic Cooperation and Development. Data collection systems related to injuries involving consumer products. Report. Paris-[Washington], 1978. 72 p.

Siemers, J.P. & Siemers-Hidma, E.H.: European integration. Select international biliography of theses and dissertations. Europäische Integration. Internationales Auswahlverzeichnis von Dissertationen und Diplomarbeiten. Intégration européenne . . . 1957-1977. Alphen aan den Rijn-Germantown, 1979. 228 p.

Westfall, Gloria: French official publications. Oxford-New York, 1980. 209 p.
(Guides to Official Publications, vol. 6.)

ARTICLES:

Boytha, Gy.: Protection of interests related to the creation and use of computer programs. Acta Juridica Acad. Sci. Hungaricae 21:337-367, '79.

Germain, C.M.: France: libraries of law and librarians. L. Lib. J. 72:235-44, '79.

Honnold, John: Bibliography: Unification of trade law and UNCITRAL. Am. J. Comp. L. 27:212-216, '79.

Japan. Translations of Japanese laws into western languages. Int'l J. L. Lib. 7:169-174, '79.

Jauregui, Jacqueline: Index of selected bilateral treaties: United States and Japan. Hastings Int'l & Comp. L. Rev. 2:105-27, '79.

Research sources on international law: bibliographic notes. I. Dictionaries and encyclopedias. II. Treaties. J. Int'l L. & Econ. 13:717-46, '79.

Scandinavia. Nordic countries: a selected bibliography. Bull. Int'l Fisc. Doc. 33:368-374, '79.
[Denmark, Sweden, Norway, Finland]

Szladits, Charles: Foreign law in English. Am. J. Comp. L. 27:158-196, '79.

Yamamoto, Nobuo: Guide to Japanese legal literature. Int'l J.L. Lib. 7:175-209, '79.

4. COMPARATIVE LAW AND LEGAL EDUCATION

BOOKS:

ARTICLES:

Derains, Yves: The International Chamber of Commerce continuing education of lawyers and arbitrators. *In*: Yearbook, Commercial Arbitration, vol. V (1980). p. 301-304.

Ottley, B.L.: Legal education in developing countries: "the law of the non-transferability of law" revisited. Loy. L.A. Int'l & Comp. L. Ann. 2:47-73, '79. [Africa, Papua New Guinea]

5. CODIFICATION OF L[illegible]

BOOKS:

ARTICLES:

Beinart, B.: Codification and restatements in uncodified mixed jurisdictions. Jewish L. Ann. 2:126-61, '79.

Chigier, M.: Codification of Jewish law. Jewish L. Ann. 2:3-32, '79.

Fleming, J.G.: The restatements and codification. Jewish L. Ann. 2:108-25, '79.

Friedmann, Daniel: Problems of codification of civil law in Israel. Jewish L. Ann. 2:88-107, '79.

Jackson, B.S.: The prospects for codification or restatement of Jewish law: a personal summation. Jewish L. Ann. 2:180-84, '79.

Tallon, Denis: Codification and consoli-

dation of the law at the present time. Israel L. Rev. 14:1-12, '79.
[civil law, common law]

6. UNIFICATION OF LAW (INTEGRATION, EUROPEAN COMMON MARKET)

BOOKS:

Collester, J.B.: The European Communities: a guide to information sources. Detroit, 1979. 265 p. (International Relations Information Guide, vol. 9.)

This annotated bibliography of approx. 1400 items is principally concerned with the political aspects of European integration.

Collins, Lawrence: European Community law in the United Kingdom. 2d ed. London, 1980, 187 p.

Congress on Private Law held by the International Institute for the Unification of Private Law, Acts and Proceedings of the 2d. New directions in international trade law. Dobbs Ferry, N.Y., 1977. 2 vols. 793 p.

Volume One contains the reports of the Congress, volume Two the written communications and oral interventions. The reports and communications are in English or French. The main subjects of the Congress were: the law of international trade: a new task for national legislation; the autonomy of contracting parties in int'l trade relations; usages and customs in the interpretation of int'l comm. contracts; contracts of adhesion and protection of the weaker party; int'l harmonisation and unification of law regarding multinational companies; the state as contracting party in concession and investment contracts; anti-trust rules and concentration on an international scale.

Lasok, D. & Bridge, J.W.: The law of the European Communities. London, 1980. 455 p.

An introductory work dealing with the "substantive law" of the European Communities.

Mathijsen, P.S.R.F.: A guide to European Community law. 3d ed. London, 1980. 256 p.

A most useful work providing an overall view of the state of development of Community law.

Plender, Richard & Usher, John: Cases and materials on the law of the European Community. London, 1980. 449 p. [Also in pb.]

Richemont, Jean de: Integration of Community law within the legal systems of the member states. Article 177 of the Treaty of Rome. Paris, [1978] 155 p.

An interesting and useful study which discusses general principles, the scope of Articles 177 E.E.C. and 150 E.A.E.C., the procedure under Article 177, characteristics of the judgments of the Court of Justice and their interpretations concerning their authority.

ARTICLES:

Akehurst, Michael: Decisions of the Court of Justice of the European Communities during 1978. Brit. Yb. Int'l L. 50:273-82, '79.

Alkema, E.A.: The EC and the European Convention of Human Rights—immunity and impunity for the Community? Comm. Market L. Rev. 16:501-508, '79.

Bryan, Harris: Copyright in the EEC—the Dietz report. Europ. Intellect. Prop'y Rev. 1:2-7, '79.

Caribbean Community. Readers' guide to the Treaty of Chaguaramas establishing the Caribbean Community. Bull. Int'l Fisc. Doc. 33:258-265, '79.

Dietz, Adolf: The possible harmonization of copyright law within the European Community. Int'l Rev. Ind. Prop'y & Copyr. 10:395-411, '79.

Dunbar, N.C.H.: Leading judgments of the European Court relating to the social law of the Community. U. Tasmania L. Rev. 6:138-60, '79.

Durand, Andrew: European citizenship. Europ. L. Rev. 1979:3-14, '79.

Easson, A.J.: The "direct effect" of EEC Directives. Int'l & Comp. L.Q. 28:319-353, '79.

European Community. EEC Treaty—Art. 85—"Tepea." Decision of the Court of Justice of the EC., June 20, 1978. Int'l Rev. Ind. Prop'y & Copyr. 10:67-79, '79.

Evans, A.C.: Development of European Community law regarding the trade union and related rights of migrant workers. Int'l & Comp. L.Q. 28:354-366, '79.

Forde, M.: The conflict of individual labour laws and the EEC's rules. Leg. Issues Europ. Integr. 1979/1:85-104, '79.

Harding, Christopher: The choice of court problem in cases of noncontractual liability under E.E.C. law. Comm. Market L. Rev. 16:389-406, '79.

Honnold, John: The United Nations Commission on International Trade Law: mission and methods. Am. J. Comp. L. 27:201-211, '79.

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BULLETINS

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Subsequently, a meeting of the Board of Editors of this Journal took place, with a report by the Editor-in-Chief and discussion of matters of editorial policy.

INTERNATIONAL FACULTY OF COMPARATIVE LAW

Prior to his unexpected death in Paris by heart attack on November 8, 1981 in his 75th year, Dean René Rodière had completed the program for the traditional spring session to be held at Strasbourg from March 22 - April 17, 1982. Professor Georges Vedel remains President of the Faculty and will preside at the election of a new Dean. Professor A. Rieg of Strasbourg continues as Director of the Faculty. Information on Faculty programs for the traditional Easter and summer sessions may be obtained from him at Faculté Internationale de Droit Comparé, Place d'Athènes, 67084, Strasbourg, France. Spring sessions always include the traditional introductory course taught in English, French and German language divisions plus the advanced II and III Cycle courses. Summer sessions are held regularly at various other Universities and are conducted largely in France, although students may speak in English.

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Gerber Products Company
Gulf Oil Corporation
International Telephone & Telegraph Corporation
Mobil Oil Company
Northrop Corporation
Standard Oil Company of California
Standard Oil Company of Indiana
Tenneco, Inc.
Texaco, Inc.
United States Steel Corporation